39 Essex CHAMBERS

3+9=Costs

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INTRODUCTION

EDITOR: Shaman Kapoor

Welcome to the 1st Edition of 39 Essex Chambers' Costs Newsletter! I am thrilled to re-introduce a formidable and active costs team headed up by Peter Hurst, retired Senior Costs Judge, and driven by silks, senior juniors, and juniors together holding 11 separate directory rankings and each with a significant practice in costs. We are supported by an incredible team of staff who remain ready, willing and able to assist our clients.

The team is energised, and Covid-19 cannot hold us back! You will see a number of initiatives roll out this year, including the launch of our in-house full Costs Mediation Service offering mediators, costs barristers and premises in one!

For now, as you sweep up what's left of the Easter Bunny's delights, enjoy this first edition which includes much thought **pre-final order**: a review of when, following a successful Defendant's Part 36 offer, indemnity costs might be ordered, whether adverse costs can be set-off in a QOCS case, how much thought should be given to interest provisions in a Part 36 offer, whether it is possible to contract out of fixed costs and a highly unusual non-party costs order against a medical expert. We also consider the recent **battles of Funders** with the possible demise of the Arkin cap, and solicitors' own duties to funders with respect to disclosure of counsel's opinion with adverse prospects. Turning to the **assessment of costs** stage, we consider the requisite threshold for compliant PoDs, and we also look at a case where the solicitors terminated a CFA in circumstances where the client did not take their advice on a potential offer. And just before you think you may have "good reason to depart" now, we update you on the meaning of that phrase vis-à-vis an approved budget and round up with a report from the first case in the Capped Costs Pilot.

Plenty to read. I am confident you will appreciate the forensic analysis and commentary that you have come to expect from this team. We look forward to being in touch very soon.

Importantly, in these strange and difficult times the entire team and I wish all our readers, their families and colleagues the very best of health.

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INDEMNITY COSTS, BUDGETING AND THE REVERSE PART 36 ISSUE

Peter Hurst

On 6th February 2020 the Court of Appeal handed down the judgment in *Lejonvarn v Burgess & Anor*[1]. The case concerned the Claimants' failure to beat the Defendant's Part 36 offer; the circumstances in which the Defendant might obtain an award of costs on the indemnity basis; and the effect on such an award of an approved budget.

Under CPR r. 36.17, where judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer, the court must, unless it considers it unjust to do so, order that the claimant is entitled to –

a) *interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;*

b) *costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;*

c) *interest on those costs at a rate not exceeding 10% above base rate; and*

d) *provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000.*

On the other hand, where a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer, the court must, unless it considers it unjust to do so, order that the defendant is entitled to –

a) *costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and*

b) *interest on those costs.*

[1] [2020] EWCA Civ 114

The extraordinary difference between the treatment of Claimant and Defendant is a result of Sir Rupert Jackson's reforms and his desire to encourage Claimants to make timely and sensible Part 36 offers.

Turning to the particular facts of the case: The Defendant was an American-qualified architect, who was a friend and former neighbour of the Claimants. Gratuitously, she provided assistance to the Claimants when they wanted to undertake major landscaping works in their garden. There was a falling-out which led the Claimants to commence proceedings against the Defendant for breach of contract and/or negligence. The Defendant denied there was any duty of care. At a preliminary issue hearing the existence of any contract was rejected, although it was found that the Defendant owed the Claimants a duty of care, a finding subsequently upheld by the Court of Appeal. That court made plain that, in the particular circumstances, the duty of care related to only such professional services as the Defendant in fact provided; in other words, she could have no liability in respect of any alleged omissions. In the proceedings, the Defendant made a Part 36 offer in the sum of £25,000 three weeks after the start of proceedings, which was not accepted.

After a 5-day trial, the judge concluded that the Defendant had in fact provided very few services and had not been negligent in providing any of them. The claim failed in its entirety. The trial Judge refused to award the Defendant costs on the indemnity basis on the basis that the Claimants' conduct had not been such as to justify indemnity costs. The defendant appealed.

The Court of Appeal described the Defendant's/Appellant's claim for costs of £724,265 as "eye watering". The Appellant's appeal together with the respondents' notice, raised three distinct issues:

> *"**a)** Whether this was a case in which the respondents' pursuit of what were said to be "speculative, weak, opportunistic or thin claims" could properly be described as out of the norm such as to warrant an order for indemnity costs.*
>
> ***b)** Whether the respondents' failures to accept and subsequently to beat the appellant's Part 36 offer, made at a very early stage in the proceedings, also meant (either separately or taken cumulatively with the pursuit of these particular claims) that an order for indemnity costs was warranted.*
>
> ***c)** The relevance, if any, of the fact that the appellant's approved costs budget was said to be £415,000, but that any assessment on the indemnity basis would start at the appellant's actual costs figure of not less than £724, 265."*

With regard to points a) and b) the Court reviewed the relevant authorities[2] and concluded:

> *"43. In short, therefore, taking the CPR and these authorities together, the position is that, in contrast to the position of a claimant, a defendant (such as the appellant in the present case) who beats his or her own Part 36 offer, is not automatically entitled to indemnity costs. But a defendant can seek an order for indemnity costs if he or she can show that, in all the circumstances of the case, the claimant's refusal to accept that offer was unreasonable such as to be "out of the norm". Moreover, if the claimant's refusal to accept the offer comes against the background of a speculative, weak, opportunistic or thin claim, then an order for indemnity costs may very well be made. That is what happened in Excelsior."*

The Court added in respect of Speculative, Weak, Opportunistic or Thin Claims, that there were a number of cases where costs have been awarded on an indemnity basis because of the weakness of the claimant's underlying claims[3]. The Court allowed the appeal in relation to the conduct of the respondents, who, having established a duty,

[2] *Reid Minty (A Firm) v Taylor [2001] EWCA Civ 1723 ; Kiam II v MGN (No 2) [2002] EWCA Civ 66 ; and Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspden and Johnson (A Firm) [2002] EWCA Civ 879.* (see paragraphs 37 – 43 of the judgment).

[3] See by way of example: *Wates Construction Limited v HGP Greentree Alchurch Evans Limited* [2006] BLR 45. In my summary of these principles in *Elvanite Full Circle Limited v AMEC Earth and Environmental (UK) Limited* [2012] EWHC 1643 (TCC).

should not have gone on, on the facts. The Court considered that the pursuit of the claims from 7 May 2017 (see below) onwards was out of the norm such as to justify an order for indemnity costs. It also considered that the Respondents' failures to accept and then to beat the Appellant's Part 36 offer was a separate and stand-alone element of their conduct which was out of the norm, separately justifying an award of indemnity costs or, in the alternative, justifying such an order, when taken together with the nature of the claims pursued by the Respondents. The Court limited the indemnity costs to the period after they had had time to digest an earlier Court of Appeal judgment of April 2017 i.e. 7 May 2017. It was unreasonable that the Respondents did not accept the Part 36 offer once they knew that a particular part of their case was not open to them. An order for indemnity costs was held to be necessary and appropriate here because, this situation was very similar to *Excelsior*: namely the pursuit of speculative/weak claims against the background of an offer that was unreasonably refused and subsequently not beaten.

The Court dealt with the relevance of the costs budget as follows:

"8.2 The Applicable Principles

89. *The figure produced by an approved cost budget mechanism (CPR r.3.12-r.3.18) is a different thing to the final assessment of costs following the trial. The former is prospective; the latter is retrospective. True it is that, in many cases, the approved costs budget will be the appropriate starting point for the final costs assessment. But that does not detract from the underlying proposition that they are different figures produced by different considerations with different purposes.*

90. *If there is an order for indemnity costs, then prima facie any approved budget becomes irrelevant. In Denton and Others v TH White Limited [2014] EWCA Civ 906, Lord Dyson MR and Vos LJ said at paragraph 43:*

> *"If the offending party ultimately loses, then its conduct may be a good reason to order it to pay indemnity costs. Such an order would free the winning party from the operation of CPR r3.18 in relation to its costs budget".*

91. *A similar comment can be found in the more recent decision of Warby J in Optical Express Limited and Others v Associated Newspapers Limited [2017] EWHC 2707 (QB), a case where indemnity costs were ordered after a Part 36 offer had been accepted out of time. Warby J said at paragraph 52:*

> *"52. In any case, it is legitimate to describe the claimants' conduct as highly unreasonable and such as to justify an order for assessment on the indemnity basis. The continued pursuit of the pleaded claim after time for acceptance of the Part 36 offer expired can properly be characterised as wholly disproportionate to the value of the claim. It is fair to say that the claimants have forfeited their right to the benefit of a proportionate assessment of the defendant's costs, and to the benefit of the doubt on reasonableness."*

92. *The absence of an overlap between the cost budgeting regime on the one hand, and an order for indemnity costs on the other, was explained in detail by HHJ Keyser QC (sitting as a judge of the High Court) in Kellie v Wheatley and Lloyd Architects Limited [2014] 5 Costs LR 854; [2014] EWHC 2886 (TCC). . . .*[4]

93. *I respectfully agree with that analysis. In principle, the assessment of costs on an indemnity basis is not constrained by the approved cost budget, and to the extent that my obiter comments in Elvanite or Bank of Ireland v Watts suggested the contrary, they should be disregarded.*

. . .

96. *Secondly, for the reasons explained in Section 8.2 above, there is as a matter of principle no overlap between a costs budget, which will have been approved on the basis of a projected*

[4] Space does not permit the inclusion of Judge Keyser's remarks but the passage may be found at paragraph 17 of his judgment.

> *series of figures for costs that were assessed as reasonable and proportionate, and the actual costs to be assessed by reference to the indemnity basis (where reasonableness might still be an issue, but proportionality is not). Thus, even if there had been an approved budget figure, it could not affect whether or not the court should make an order for indemnity costs."*

Does this mean that in any case, where a party's failure to accept and then to beat the other party's Part 36 offer is a separate and stand-alone element of their conduct which is out of the norm, separately justifying an award of indemnity costs or, in the alternative, justifying such an order, when taken together with the nature of the speculative, weak, opportunistic or thin claims pursued by that party, there is an even greater risk of an award of indemnity costs?

Whilst it is not out of the norm to believe in one's case and to have the right to litigate it, it is clear that pursuing a speculative, weak, opportunistic or thin claim is likely to result in an adverse costs order on the indemnity basis.

Perhaps this case will encourage parties to try for an order for indemnity costs more frequently, but the arguments will always remain fact sensitive. Coulson LJ (Deputy Head of Civil Justice) has always had an interest in costs so there may be a greater appetite for costs in the Court of Appeal from now on.

SET OFF AND QOCS: AN UNFAIR ADVANTAGE TO DEFENDANTS?

Nicola Greaney

In *Faulkner v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 296 (QB), Mr Justice Turner was faced with the question as to whether or not a defendant in proceedings to which the QOCS regime applies can nevertheless seek to set-off a costs order made in its favour against a costs order made in favour of the claimant.

Different answers to that question had previously been given by HHJ Dight in *Darini v Markerstudy Group* 24 April 2017 (unrep.) and by Lewison LJ in *Howe v Motor Insurers' Bureau* (2017) WL 05659795. The Court of Appeal in Howe does not appear to have been referred to the decision in *Darini* when asked to decide this question. Plainly the decision in Howe is the binding authority.

In Faulkner, the issue of set-off arose in similar circumstances to those in *Darini*. Mr Faulkner issued his claim (which was for injury to his lungs arising from alleged tortious exposure to harmful dust during the course of employment) but decided to serve a notice of discontinuance, after the Judge had listed the case for a preliminary hearing but before that preliminary hearing had been heard. As in Darini, the defendant responded to the notice of discontinuance by issuing an application to set it aside. In both *Faulkner* and *Darini*, the defendants' applications to set aside were dismissed with a costs order being made in favour of the claimant. So in both claims, the defendant had a deemed costs order in its favour following discontinuance (pursuant to CPR r. 38.6(1)) and the claimant had a costs order in its favour following the dismissal of the defendant's application to set aside.

In *Faulkner* (and presumably in *Darini*), the defendant's plan was to reinstate the claim with the intention of making an application for strike out with the consequence of removing the claimant from QOCS protection under CPR r. 44.15 (permitting the enforcement of costs orders to the full extent without permission). Mr Justice Turner spoke in scathing terms about the defendant's tactical approach in Faulkner, describing the bid to strike out the resurrected claim as "doomed to failure" and "deeply flawed".

Mr Justice Turner concluded, rightly, that he was bound by the Court of Appeal's judgment in Howe and on that basis found that set-off was not a form of "enforcement" and hence, the court's power to order set-off pursuant to CPR r. 44.12 (contained in section I of Part 44) was not ousted by the QOCS regime (contained in section II of

Part 44). However, in exercising his discretion under CPR r. 44.12 as to whether to order set-off, he refused to order set-off essentially on the basis that the defendant had adopted an entirely wrong tactical approach given the weakness of its case on strike out. He pointed out that the claimant's discontinuance of the claim had ironically saved the defendant money because it would otherwise have had to fight the claim to a preliminary hearing. It was wrong that the claimant should end up in a worse position by reason of the defendant's failed application. He was, however, careful to point out that he was making a decision on the facts before him and was not concluding that the discretion to set-off costs would be exercised against a defendant in every case in which it unsuccessfully applies to set aside notice of discontinuance of a claim falling within the QOCS regime.

Whilst Mr Justice Turner did not need to undertake a detailed analysis of the arguments for and against the court having the power to order a set-off of costs against costs incurred in the same proceedings (embodied in CPR r. 44.12), given that he was bound by *Howe*, it is worthwhile reflecting a moment on the principles underlying that decision and the law of set-off as it applies to costs generally.

As Lord Justice Lewison acknowledged in *Howe*, the power of the court to order a set-off of costs against costs is a general discretion derived from s. 51 of the Senior Courts Act 1981. Indeed, there is authority that the court has an inherent jurisdiction to order set-off of costs against costs[5]. Indeed, old case law shows that this includes a power to order set-off of costs orders incurred in different proceedings between the same parties so as to achieve fairness between the parties (*Reid v Cupper* [1915] 2 KB 147). As Brooke LJ said in *R (Burkett) v Hammersmith & Fulham LBC* [2004] EWCA Civ 1342, a set-off of costs against costs is "essentially discretionary in nature, a discretion only to be withheld from a Judge by specific rules of law." It is different in nature to a set-off pleaded as a defence to an action where strict rules apply in relation to legal and equitable set-off including rules as to mutuality[6].

There is nothing specific in Part 44 that removes the discretion of the Judge to order set-off by reason of the QOCS regime.

There is also an important parallel to be drawn with the position of legally aided claimants prior to the coming into force of the QOCS regime. The Court of Appeal in *Burkett* was concerned with set-off in the context of a legally aided claimant. Brooke LJ in Burkett said *"a set-off does not place the person against whom it is asserted under any obligation to pay, but merely reduces the amount that he can recover."* (para. 50). He did not agree that this approach was artificial or contrary to the spirit of costs protection. Lewison LJ agreed with this analysis in Howe and said that set-off is not a species of enforcement and that enforcement for the purposes of r. 44.14 means enforcement in accordance with the rules of the court including powers to compel compliance. Furthermore, the court has to grant permission for set-off under r. 44.12 whereas no permission is required under r. 44.14 (para. 3). It is worth bearing in mind that Sir Rupert Jackson envisaged that claimants would get similar costs protection under QOCS to that afforded to legally aided claimants.

In reality, the unfairness as to outcome that would follow if set-off had been ordered in *Darini* or in *Faulkner* is a factor that the court can bear in mind and is likely to lead to a refusal to order set-off in similar cases. However, the court has the discretion to order a set-off where it does justice between the parties, as was the position on the facts in *Howe*.

[5] Izzo v Philip Ross (2001) The Times, 9 August, ChD, *R(on the application of Burkett) v Hammersmith and Fulham LBC* [2004] EWCA Civ 1342 at 44

[6] In summary, the claim and cross-claim are closely connected and between the same parties. Although in reality claims for costs between parties to the same action would generally satisfy mutuality requirements.

PART 36 AND INTEREST

Simon Edwards

1. Just before Christmas the Court of Appeal in *Francis King v City of London Corporation* [2019] EWCA Civ 2266 held that it was not possible to make a valid Part 36 offer exclusive of interest and that if a party made an offer exclusive of interest it could not be a Part 36 offer and, therefore, that party could not benefit from the provisions of Part 36 if the result was as good as or better than that which was offered.

2. This all arose in the context of detailed assessment proceedings but the judgments make it clear that the principle is of general application. In so doing, the Court of Appeal upheld Judge Dight, who had dismissed an appeal from Deputy Master Campbell and overruled the decision of Nicol J in *Horne v Prescot* [2019] EWHC 1322 (QB).

3. In the King case the offer had been made in the following terms:

"The Claimant hereby offers to accept £50,000.00 in full and final settlement of the costs detailed within the Bill only.

This offer is made pursuant to CPR 36. The offer is open for 21 days from deemed service of this letter. If the offer is accepted in this time the Defendant shall be liable for the Claimants costs in accordance with CPR 36.13.

The offer relates to the whole of the claim for costs within the Bill and takes into account any counterclaim, but excludes interest."

4. As such, the offer was, on its face, clear and the offeree would be under no illusion that, if accepted, interest was on top. Indeed, hitherto anyway, such offers in detailed assessment proceedings were commonplace if not the rule.

5. Why, then, did the Court of Appeal hold that such an offer was not a valid Part 36 offer, in contrast to the ruling of Nicol J?

6. The reason was in Part 36.5(4) which provides:

"A Part 36 offer which offers to pay or offers to accept a sum of money will be treated as inclusive of all interest until—

(a) the date on which the period specified under rule 36.5(1)(c) expires; or

(b) if rule 36.5(2) applies, a date 21 days after the date the offer was made."

7. The Court of Appeal held that that was a mandatory provision (see paragraph 34) and rejected the argument that an offer exclusive of interest was an offer to settle part of a claim and, therefore expressly permitted by Part 36.2(3) (see paragraph 40).

8. The Court of Appeal then went on to consider the argument that had found favour in front of Nicol J namely that interest is not part of the claim in detailed assessment proceedings (see paragraph 66 of his judgment). Overruling Nicol J, the Court of Appeal held that, because of the terms of 36.5(4), all interest, including interest running automatically under the Judgments Act, had to be included in the offer to make it a valid Part 36 offer (see paragraph 50).

9. It is my view that there are a number of reasons why, as a matter of policy, the outcome is regrettable. The first is the fundamental one and that is that it means that a party in a claim that includes both capital and interest cannot make an offer within the Part 36 regime that is for the capital only. Where the capital and interest claims are governed by a contract, it may well be that there are serious issues, whether as to interpretation or fact or the application of facts to law as to the interest payable in the claim, and it may be that that is the real bone of contention and not the issue as to the capital payable.

10. In those circumstances, it would seem logical and fair to allow parties to make offers in relation to just the capital and, indeed, it would appear that it may well be possible to make a Part 36 offer simply in relation to interest. That,

on the face of it, is illogical and without any clear justification.

11. As regards detailed assessment proceedings, there is the additional point that interest is not included in the bill or the Notice of Commencement and, to a large degree, runs automatically. As mentioned above, that point was argued as a reason why interest in detailed assessment proceedings is not part of the claim and, therefore, should be excluded from considering whether a Part 36 offer was valid or not. That argument did not find favour, but the fact remains that in detailed assessment proceedings interest is very much left over until the conclusion of the case and is, in general, a matter of arithmetic, although it is true to say that the court has powers to disallow interest in appropriate cases.

12. Thus, in detailed assessment proceedings, interest is not the focus of attention. It is the amount due on the bill. It makes it much easier to settle a bill if an offer is made for the amount on the bill with the arithmetic in relation to the interest to be considered afterwards. Unfortunately, the Court of Appeal's judgment means that this cannot be done via Part 36.

13. Lord Justice Arnold, in any event, in the Court of Appeal, was plainly concerned about the outcome. At paragraph 86, he said that he had come to the conclusion that the appeal should be dismissed reluctantly and urged the Civil Procedure Rules Committee to consider permitting Part 36 offers exclusive of interest at least in detailed assessment proceedings. It is to be hoped that this is done as soon as the situation allows.

UNFIXING FIXED COSTS

Michael Standing

***Turner v Cole* (Unreported) (16 December 2018)**

Personal injury practitioners will be all too familiar with the rigidity of the fixed cost regime for low value claims which begin life in the Portal. The case of *Tuner v Cole* however highlights that fixed costs need not be fixed if the parties expressly agree otherwise. The case is a salutary reminder to defendant insurers to ensure that the cost consequences of any compromise agreement are carefully considered.

The Facts

Ms Turner brought a claim for damages including personal injury, arising out of a road traffic accident which occurred on 14 June 2015. The claim commenced in the Portal, but later "dropped out". The Defendant accepted that the value of the Claim was likely to exceed the £25,000 Portal limit.

By way of email on 26 June 2017, the Defendant's insurers' underwriters wrote to the Claimant making two offers of settlement. The first was made pursuant to Part 36 in the sum of £55,000, gross of (nil) deductible benefits, and an interim payment of £2,000, giving an offer of £53,000. It is however the second offer that gave rise to this dispute. The second offer was a 14-day, time limited offer of £60,000 net of CRU and interim payments. In respect of costs the offer stated *"In addition we will pay your reasonable costs, to be assessed if these cannot be agreed."*

The Claimant's solicitors responded by letter within the 14 days, stating:
"… we have instructions to accept the time-limited offer indicated within your correspondence of the 26th June 2017.

Acceptance of the offer is strictly predicated on the basis as follows:

1. *The Claimant does accept the offer of being paid £60,000 net of CRU and interim payments and*

this payment will be made within 21 days in relation to her claim for personal injury and loss.

2. *In addition, the Defendants will pay the Claimant's legal costs to be (sic) detailed assessment if not agreed on the standard basis (and it is strictly accepted by the Defendants that* ***costs will be paid on the standard basis and not in accordance with any portal, fixed costs or predictive costs basis).*** *In terms of costs it is also requested that in (sic) interim payment on account of costs be made for the sum of £40,000 ...* [emphasis added]

On the basis that the terms indicated within this correspondence are agreed we look forward (sic) hearing from you as a matter of urgency."

The Defendant's insurer replied:
Thank you for your letter indicating acceptance, I confirm I will forward a cheque for £60,000 payable to your client immediately.

With regard to your costs, in view of the amount of the interim request, I will be instructing costs draughtsmen (sic) – I would suspect they would want more detail and I will leave the question of any payments on account of costs to them. If you send me details and I will instruct them at that point.

In later correspondence, the Defendant sought to suggest that the only costs recoverable by the Claimant were those fixed costs under Section IIIA of Part 45.

Costs only Part 8 proceedings were issued, and District Judge Baldwin, sitting as the Regional Costs Judge, was asked to determine whether fixed costs or conventional costs applied.

The Arguments
On behalf of the Defendant, it was argued that it was not open to the parties to contract out of fixed costs; this would be contrary to the ethos of the rules, and contrary to the express wording of the rules, which, for example at CPR 45.29B provided that *"the only costs allowed are"* the specified fixed costs and permitted disbursements.

The Claimant relied upon the authorities of *Solomon v Cromwell* [2011] EWCA Civ 1584 and the recent case of *Ho v Adelekun* [2019] EWCA Civ 1988.

In *Solomon*, a case decided under section II of Part 45, as it then was, Moore-Bick LJ, made clear at [22] that:

> ***There is nothing in the Rules to prevent parties to a dispute settling it on whatever terms they please, including as to costs.*** *Section II of Part 45 is concerned with proceedings under rule 44.12A and prescribes what the receiving party is to be allowed by way of costs in such proceedings. I do not think that it is open to the parties by their agreement to expand or limit the court's powers and if the Claimant chooses to proceed under rule 44.12A he will be unable to recover more than the amount for which Section II of Part 45 provides.* ***However, there is no reason in principle why, if parties choose to agree different terms, the agreement should not be enforceable by ordinary process.***
> [Emphasis added]

In *Ho*, the approach in *Soloman* was approved by Lewey LJ at [12]:

> *On the other hand, there is no bar on contracting out of the fixed costs regime. In* Solomon v Cromwell Group plc, *Moore-Bick LJ spoke at paragraph 21 of parties being unable to recover more or less by way of costs than is provided for under the fixed costs regime "subject to any agreement between the parties to the contrary".*

The Findings
Accordingly, DJ Baldwin found that he was *"left in no doubt* [...] *that it was open to the parties to contract out of fixed cost, by reaching an agreement that regard".* Any agreement to contract out of fixed costs, however, would require sufficient clarity of the agreement. It is of note that in *Ho*, whilst accepted that in principle the parties could contract out of fixed costs, the Defendant's acceptance of a Part 36 offer which included the words *"such costs to be subject to detailed assessment if not agreed"* was not sufficient to

take the matter outside the fixed costs regime. In the instant case, the agreement between the parties was clear and unambiguous.

Comment

This case should serve as important reminder to defendant solicitors and insurers to carefully consider the terms of any offer (or indeed counter-offer) made. There should be no assumption that fixed costs will apply. If, on the face of the settlement between the parties, there has been a clear and concluded agreement that fixed costs will not apply, the court will not hesitate to give effect to that agreement. In Turner, costs were awarded on the standard basis, to be determined by detailed assessment, in default of agreement. Undoubtedly, this will have resulted in a greater recovery than would otherwise have been the case under the fixed costs regime.

NON-PARTY COSTS ORDERS: EXPERTS BEWARE

Marion Smith QC

***Thimmaya v Lancashire NHS Foundation Trust* [2020]**

This is a highly unusual case. The Trust, as defendant to clinical negligence proceedings brought by Mrs Thimmaya, obtained a costs order against the Claimant's expert (a consultant surgeon) ("the Expert").

Matters unfolded in this way.

- It is not clear from the report when the County Court action started but in 2017, the Claimant's solicitors asked the Expert to confirm his suitability to report.
- November 2017, the Expert who was suffering from psychiatric difficulties was off sick from his clinical work but not his medico-legal work. In 2018 the Expert retired from clinical practice. The judgment records that the Expert *"did not even inform the Claimant or her advisers of his medical condition"*.
- May 2018, the Expert was involved with the preparation of the experts' Joint Statement. He referred in this to "best practice", not the usual Bolam/Bolitho test for determining breach of duty in clinical negligence cases.
- March 2019, during cross-examination the Expert could not articulate the Bolam/Bolitho test. He ultimately said he did not know the test to be applied. The Claimant then had no real choice but to discontinue her claim.

The Defendant's position was that, in part flowing from his duties to the Court under CPR Part 35, the Expert should have realised he was not competent to act as an expert witness as:

- Mrs Thimmaya's claim involved surgery he had carried out himself only twice (and then only under supervision).
- He was not aware of the legal test for breach of duty.
- He was suffering from psychiatric difficulties.

The Expert accepted with hindsight he was not fit at the time of the trial to give expert evidence, due to his mental health problems. He did not accept he was unaware of the Bolam/Bolitho test for breach of duty. He said he was unable to articulate the test at trial because he had an adverse psychiatric reaction to the Defendant's Counsel's questioning. Counsel reminded him of an interrogator who had previously interrogated him in Iraq.

The Judge ordered the Expert to pay the Defendant's costs from November 2017 and the Defendant's costs of the costs application. The Parties agreed the jurisdiction was to be exercised on the same basis as a wasted costs order. The test applied was whether the Expert's conduct was improper, unreasonable, or negligent.

The Judge found that by the time of the trial the Expert did not have a proper understanding of the test to be applied in giving an opinion as to whether a clinician had been negligent. She did not accept his explanation as to why he had been unable to deal in cross-examination with the questions about breach of duty. In her view the Expert could not answer the questions because he did not know, was unable to recall, or could

not apply the legal test, perhaps because of his general cognitive difficulties caused by his mental health problems. The Judge found that the Expert should not have continued to act as an expert witness, whether in court or in writing or in conference, when he was unable to work in his clinical practice due to his mental health problems. He should have taken sick leave from his medico-legal practice at the same time as he did from his clinical practice, in November 2017.

The Judge recognised that the jurisdiction to make wasted costs orders was to be exercised exceptionally. She could not find a failing on the Expert's part before November 2017 that was sufficiently exceptional. The Expert's reports were not particularly well written, nor well argued. In her view he was not *"a very good expert"* and he did not have a great deal of expertise in carrying out this particular operation. But the Judge said there were *"plenty of not very good experts around"* and plenty of cases where an expert gave an opinion where they were not particularly experienced in the operation concerned.

The Judge found that the Expert's conduct in continuing to act as an expert for Mrs Thimmaya caused the Defendant to incur all of its costs after November 2017. It was just to order the Expert to pay those costs. The Expert owed important, and significant, duties to the Court. He failed comprehensively in those duties from November 2017 onwards. As a result, a public body had incurred significant unnecessary costs. The Claimant lost her entitlement to have her case tried on its merits. A considerable amount of court time had been wasted. Whilst the Judge had sympathy for the Expert's personal position the balance came down firmly in favour of the Defendant.

There are five points to take away from this.

- The case is of limited weight as a precedent as it is a decision at the County Court level. However, it provides support for the existence of the jurisdiction to award costs against an expert, and an example of the circumstances in which such a jurisdiction will be exercised.
- The facts are exceptional, and the Judge's conclusions in relation to the Expert's conduct from November 2017 are not surprising.
- Her comments about the Expert's reports and expertise before November 2017 gives a frankly depressing assessment of the present situation in civil litigation. Moreover, to use her words "not very good experts" are not likely to have costs orders made against them on the present state of the law.
- Whether Judges are more amenable to make this sort of costs order against "not very good experts" in less extreme circumstances remains to be seen. The post-Covid-19 era we are moving into may provide the impetus to do this. There is a growing realisation of the value and importance of the work carried out by the NHS, and a consequential desire to avoid wasting its resources of time and money.
- The prudent solicitor ensures that one of the terms of any expert retainer is an obligation to disclose immediately any medical condition which may affect the ability of the expert to provide his/her services.

CHAPELGATE CREDIT OPPORTUNITY MASTER FUND LTD V MONEY: THE DEMISE OF THE "ARKIN CAP"?

Judith Ayling and Philippe Kuhn

The Court of Appeal has recently affirmed the decision of Snowden J ([2019] EWHC 997 (Ch); [2019] 1 WLR 6108) in the important case of *ChapelGate Credit Opportunity Master Fund Ltd v Money* [2020] EWCA Civ 246.

The decision clarifies the role of *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655; [2005] 1 WLR 3055. For years *Arkin* was treated as limiting a commercial funder's costs liability to the total amount of funding provided ("the Arkin cap").

The Court of Appeal has now confirmed, agreeing with Snowden J, that *Arkin* only represents an "approach" to capping the costs payable by a non-party funder, as a matter of discretion under s.51 of the Senior Courts Act 1981 ("SCA 1981"). It is not a binding rule. The Court of Appeal also upheld Snowden J's exercise of discretion on the facts. ChapelGate was ordered to pay the costs of the litigation incurred after the date of the funding agreement, without the benefit of the *Arkin* cap.

1) Factual background:
The underlying proceedings concerned allegations by Ms Davey against the administrators of her company ("AHDL"), those administrators having been appointed by Dunbar Assets Plc ("Dunbar"), in connection with the sale of AHDL's premises for £17.05m. Ms Davey alleged breach of fiduciary duty, a failure to exercise independent judgment in the administration and sale at a substantial undervalue against the administrators. She alleged interference in the administration and conspiracy to injure against Dunbar. The estimated value of the claim was in excess of £10m and considered to have good prospects.

On 23 December 2015, ChapelGate entered into an agreement ("the Funding Agreement") with Ms Davey. Total funding was originally up to £2.5m on the condition that Ms Davey took out ATE insurance, and in return Ms Davey agreed to return the outlay and a profit share on an increasing scale in the event of success. Ms Davey was required to provide ChapelGate with information about the litigation, but was left with complete control over its conduct. Provision was made for payment to ChapelGate first, followed by the lawyers and any residue to Ms Davey.

By a further agreement dated 12 February 2016 between ChapelGate and Ms Davey, the requirement for Ms Davey to obtain ATE insurance was waived and ChapelGate's commitment was halved to £1.25m, while the profit entitlement remained the same. The adjustment was based on ChapelGate's assumption that the *Arkin* cap would limit any adverse costs order to £1.25m, and so its total outlay would be £2.5m. ChapelGate purchased ATE insurance for itself for £650,000 in March 2016.

Snowden J dismissed Ms Davey's claims on 11 April 2018 ([2018] EWHC 766 (Ch)). In a costs judgment on 23 April 2018, he found that, by combination of the serious nature of the allegations (effectively 'dishonesty') and Ms Davey's inappropriate conduct of the litigation, indemnity costs assessed at £3.9m were payable. When she failed to pay, an application for a non-party costs order against ChapelGate was made for the costs of the entire proceedings.

2) Snowden J's decision – [2019] EWHC 997 (Ch):
Snowden J granted a non-party costs order against ChapelGate in excess of the *Arkin* cap of £1.25m. However, importantly, these costs were limited to the period following the Funding Agreement ("the period issue").

On the period issue, he held (at [41]) that there was "a clear distinction between a person who becomes the litigating party … and one who simply supports litigation and is pursued for costs under section 51". He also relied (at [43]-[47]) on *Excalibur Ventures LLC v Texas Keystone Inc* [2014] EWHC 3436 (Comm) for a causation requirement and found that the costs prior to the Funding Agreement had been incurred without ChapelGate's involvement.

As to the *Arkin* cap, he concluded (at [89]) that this was best understood as "an approach" which may lead to a "just result", rather than "a rule to be applied automatically in all cases involving commercial funders". He particularly relied on comments about the broad nature of the discretion under s.51 SCA 1981 by Lord Brown in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807.

On the facts, Snowden J did not apply the Arkin cap. In sum:
1) ChapelGate approached its involvement

throughout as a commercial investment ([91]);

2) The case involved conduct of the litigation significantly out of the norm ([92]);

3) It must have been apparent that there were likely to be very substantial costs well in excess of those ChapelGate proposed to invest and which Ms Davey could meet ([95]);

4) The halving of ChapelGate's commitment, while keeping the profit shares unadjusted, showed that "ChapelGate was closely focussed on its own self-interest" ([96]);

5) ChapelGate had negotiated a substantial commercial profit with priority over any compensation payable to Ms Davey ([99]); and

6) The policy argument that commercial funders would be discouraged from litigation without the benefit of the Arkin cap lacked merit ([106], [110]).

3) Court of Appeal decision – [2020] EWCA Civ 246:

The appeal came to the Court of Appeal on the *Arkin* cap issue only. The administrators and Dunbar claimed costs amounting to some £4.33m after the Funding Agreement and about £3.15m before. The fact that ChapelGate were not liable to pay costs before the Funding Agreement is therefore significant, as well as the fact that the *Arkin* cap was not applied.

Newey LJ (with whom Moylan and Patten LJJ agreed) broadly accepted Snowden J's analysis on the *Arkin* cap and agreed that it was not a binding rule (at [38]-[39]). The key points are:

1) The terminology used in *Arkin* "may well reflect [the Court of Appeal's] perception that a decision as to what, if any, costs order to make against a commercial funder is in the end discretionary." Such an approach is consistent with s.51 SCA 1981, which is "framed in entirely general terms". ([34])

2) Circumstances in which "a funder had met only a discrete part of the total costs" but in which it might still be "just" to apply the *Arkin* cap include cases in which the potential return or gain to be made by the funder was significantly in excess of its outlay or investment. *Arkin* had focussed "exclusively" on "the extent of the funding provided", which is to be avoided. In general, "[t]he more a funder had stood to gain, the closer he might be thought to be to the "real party" ordinarily ordered to pay the successful party's costs". ([35], [38])

3) Commercial funders, conditional fee agreements and ATE insurance are "much more established" than at the time of *Arkin*. As such, "[t]he risk of someone with a claim which has good prospects of achieving success without disproportionate cost being unable to pursue it" without the *Arkin* cap have "diminished". ([36])

4) The cap might still be appropriate in certain cases like *Arkin* itself where funding "merely covered the costs incurred by the claimant in instructing expert witnesses". *Burnden Holdings (UK) Ltd v Fielding* [2019] EWHC 2995 (Ch) was also cited with apparent approval. ([37])

As to the exercise of discretion, the Court of Appeal considered that Snowden J was entitled to rely on the factors summarised above. He was also not obliged to attach any significance to the respondents' failure to seek an order for security for costs. ([44]-[48]).

4) Analysis:

It is at least a relief for funders that, ordinarily, a commercial funder will only be liable for costs incurred after the date of the funding agreement. However, the status of the *Arkin* cap is clearly much diminished, even if it has not been entirely consigned to history. It has been limited by *ChapelGate* to a seemingly narrow category of cases where investment is limited and used for a specific purpose such as expert evidence and without the potential of a disproportionately large profit by the funder.

The thrust of the analysis is consistent with the general language used in s.51 SCA 1981 and prior authorities to that effect at all levels, including

Dymock. An implicit point in *ChapelGate* is that a more definite cap for funders would probably require a rule change. The necessity of such a change was downplayed by the Court of Appeal. In its judgment it states that commercial funders, conditional fee agreements and ATE insurance are an established part of litigation and adverse costs risks without the *Arkin* cap are unlikely to amount to a major deterrent for meritorious litigation.

Practically, it will be important for funders to revisit any risk assessments made on the assumption of an *Arkin* cap in existing litigation. Funding models and the need for and extent of ATE insurance will have to be given careful attention in both ongoing and new litigation. Moreover, without the *Arkin* cap, funders would do well to keep a closer eye on both parties' incurred and estimated costs. Greater oversight of conduct of the litigation is also advisable (balancing this against the requirement not to control litigation), given the added exposure if costs are assessed on the indemnity basis.

ARE THERE DIRECT OBLIGATIONS FOR A LAW FIRM TO DISCLOSE THE ADVERSE OPINION OF COUNSEL ON PROSPECTS OF SUCCESS TO A FUNDER?

Shaman Kapoor

The short answer is "depends"! It comes down to the interpretation of contracts, but the potential of there being a direct obligation between firm and funder should be enough to cause every firm, funder and insurer to review the current arrangements in place on a funded case together with a careful review of the contractual documentation for future cases.

In the case of *John Hall (assignee of 1st Class Legal (IS) Ltd) v (1) Saunders Law Ltd; (2) Subir Kumar Karmakar; (3) Saunders & Partners LLP [2020] EWHC 404 (Comm),* Mr. Richard Salter QC sitting as a Deputy Judge of the High Court handed down his judgment on 27th February 2020.

The case involved a complaint made by the funder (through its assignee) that the solicitors did not communicate to them the various pessimistic views expressed by counsel as to the prospects of success of the action being funded. It was alleged that through the tri-partite agreement, those omissions constituted a breach of contract, a breach of a common law duty of care and/or of a fiduciary duty, and further that the solicitor had made a conscious decision not to make such disclosures and as a result became liable in the tort of deceit.

The defendants applied for summary judgment and/or strike out. They asserted that the contract documentation revealed no such obligation upon them to disclose the said pessimistic views of counsel, and that any duties that may have existed were owed by their client to the funder directly. Further, the claims in contract, tort and as pertaining to fiduciary duty were misconceived in law and that the action in deceit against Mr. Karmakar personally was bound to fail as it was not based on any positive statement but only a pure omission to speak.

The facts of the substantive dispute make for illuminating reading. On 04/11/2000, Malicorp Ltd ("the claimant") entered into a contract with the government of the Arab Republic of Egypt ("Egypt") to design and construct a new airport at Ras Sudr and thereafter to operate that airport for 41 years ("Concession Contract"). On 12/08/2001, Egypt purported to cancel the Concession Contract.

In April 2004, the claimant began arbitration proceedings against Egypt in the Cairo Regional Centre for International Commercial Arbitration. A three-person tribunal was appointed consisting of an arbitrator appointed by the claimant, an arbitrator appointed by Egypt and a tribunal chairman. On 19/02/2006, the Judicial Administrative Court of the Egyptian Council State set aside the arbitration clause in the Concession Contract and ordered the suspension of the Arbitration. The Tribunal member appointed by Egypt resigned. Nevertheless, the remaining two

tribunal members went on to make an award on 07/03/2006 in which, despite rejecting the claim for breach of the Concession Contract, they awarded the claimant US$ 14,773,497 by way of damages, interest and costs ("Award").

The claimant made attempts to enforce the Award in France. Those attempts were unsuccessful as were yet further proceedings brought by the claimant for state expropriation. In or about February 2011, the claimant instructed Balsara & Co. Ltd ("1st Solicitors") to act for it in proceedings which sought to enforce the Award in England. Mr. Karmakar held a position said to be equivalent to a partner in that firm and he was the primary fee earner on the case. With the assistance of the 1st Solicitors, the claimant applied for litigation funding (to 1st Class Legal) and ATE (to Gable Insurance AG). The Proposal Form was signed by a director of the claimant and by Mr. Karmakar on behalf of the 1st Solicitors.

The Proposal Form provided that funding would only be available for *"…actions where a financial remedy is sought, and where prospects of success are at least 60-65%…"*. The declaration completed by the claimant and Mr. Karmakar declared a 70% prospect of success. The Proposal Form was signed with a statement of truth as to the information provided.

In November 2011, funding was approved and ATE was provided by Gable for own-costs and adverse costs up to a value of £350,000. On 16/12/2011, the indemnity was increased to £1,476,200.

The policy wording of the ATE policy provided, inter alia, that the *"…Insured and the Legal Representative shall keep the Insurer informed in writing as promptly and reasonably practicable of all material developments in the Proceedings…"*. The wording also included conditions precedent to any payment which included a condition to have access to the files of the claimant and the legal representative. The wording also provided that *"… any person who is not a party to this agreement has no right by statute or otherwise to enforce any term of this Policy"*. Critically, the wording also provided for a termination clause which enabled the insurer to withdraw the benefit of the policy in the event that Gable had not been informed of a material development from such date as it should have been so notified.

On 28/02/2012, the claimant began enforcement proceedings to enforce the Award in the Commercial Court in London. The 1st Solicitors acted under a CFA. On 29/02/2012, Flaux J gave permission under the Arbitration Act 1996 s.101 to the claimant to enforce the Award subject to any application by Egypt to set-aside that order within a 10-week period. By July 2012, Mr. Karmakar left the 1st Solicitors and joined Saunders Law Ltd and/or Saunders & Partners LLP (together "2nd Solicitors") filing a notice of change in August 2012. On 15/10/2012, Egypt applied to set aside Flaux J's order.

As between the claimant and the 2nd Solicitors, the 2nd Solicitors contracted to continue to act under the terms of the 1st Solicitors' CFA. The 2nd Solicitors, the claimant and the funder entered into a new Funding Agreement. In that agreement, if the claim was successful, the funder would be paid any sums it paid out plus a success fee. If the claim was unsuccessful, the funder would be repaid the total funding amount it paid within 5 business days of the receipt of payment from Gable. Further, and critically, the agreement also provided for obligations upon the claimant which included an obligation to keep the funder promptly informed of any significant developments in the proceedings which may be material (including any advice coming to the attention of either the claimant and the 2nd Solicitors). This condition, and equivalent ones, were stated to be in the following terms:
Malicorp shall…instruct [Saunders] to provide the Funder with any documents or information…

Malicorp shall…through instructions to [Saunders] and/or in its own account, keep the funder promptly informed…

Furthermore, the agreement as between them also provided the funder with an entitlement to refuse further funding, upon notice, where the funder was no longer satisfied with the merits, the claim was no longer viable to fund or the funder considered there to have been a material breach of the agreement.

In the event, on or about 11/01/2013, the 2nd Solicitors obtained a copy in English of a judgment handed down on 05/12/2012 by the Cairo Court of Appeal which declared the Award to be void and of no effect as a matter of Egyptian law given that it had been delivered by only two of the three appointed arbitrators. Mr. Karmakar took the view, and advised the funder, that his view of the prospects of success had not changed principally because of the views of Egyptian counsel who took a bullish view about the prospects of a successful appeal to the Court of Cassation in Egypt.

In May 2013, leading and junior counsel in England expressed the view that the prospects of success were not good. Further pessimistic advice was received in October 2013 and then in May and June 2014 when junior counsel expressed the view that the prospects were no better than 50%.

Egypt's application to set aside Flaux J's order came on for hearing before Walker J on 16/09/2014. The claimant failed to file any evidence about Egyptian law and failed to instruct counsel. On 19/02/2015, Walker J granted Egypt's application and that effectively ended the enforcement proceedings.

After a review of the files, Gable noted that counsel's opinion on the prospects of success had not been notified to the funder and in fact had been intentionally withheld by the claimant on specific instruction. Moreover, that adverse prospects of success were a material development and the failure to notify the insurer of such a material development entitled Gable to withdraw the benefit under the policy. Gable therefore refused to pay out.

The funder went into Administration and the liquidators assigned its claims to Mr. Hall thus giving rise to the subject proceedings and the 2nd Solicitors' application for summary judgment and/or strike out. The Court considered the usual provisions and case law pertaining to CPR Part 24 and weighed up whether the funder had realistic prospects of success on any of the pleaded causes of action. The Court was taken through the principles of contractual interpretation and in particular those summarised by Lord Neuberger in *Arnold v Britton* [2015] UKSC 36, Lord Hodge in *Wood v Capita Insurance Service Ltd* [2017] UKSC 24, and by HHJ Pelling QC in *TAQA Bratani Limited v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm).

The Court considered the argument about contractual interpretation to be a "short point (or series of points) of law" and that it was in accordance with the overriding objective to determine those issues summarily (readers will note 2 days of hearing and 35 pages of judgment!). The Court found that the contractual obligations did not impose a direct free-standing obligation upon the 2nd Solicitors to the funder to notify of adverse opinion on the prospects of success. The obligation was upon the claimant not 2nd Solicitors. There was no basis for implying further obligations as the test of necessity would not be satisfied. And as there was no contractual duty upon the 2nd Solicitors, there could not be a duty of care at common law or as a fiduciary in equity. Finally, the Court found that as there was no pre-existing duty to disclose upon Mr. Karmakar, the law was clear that there was no liability in damages and as a result the claim for damages in the tort of deceit failed. The 2nd Solicitors' application therefore succeeded.

This case illustrates how the contractual framework between the relevant parties in a funded case is all important. It also demonstrates the ongoing need for litigators to remind themselves of their obligations pursuant to the agreements with funder and with ATE insurer. Moreover, it reminds funders and insurers to take

great care in reflecting in their written terms their full intentions. In a climate where funding and ATE insurance is becoming more and more prevalent, the care with which these agreements should be reviewed cannot be understated. If all protagonists are too quick to celebrate the win of funding without considering with the utmost care the terms and conditions, we will see choppy waters ahead.

POINTS OF DISPUTE: THE DEVIL'S IN THE ABSENCE OF DETAIL

Caroline Allen

***Ainsworth v Stewarts Law LLP* [2020] EWCA (Civ) 178**

In *Ainsworth*, the Court of Appeal considered how detailed points of dispute should be in a solicitor / own client assessment. The Court upheld the decision of Chief Master Gordon-Saker at first instance to dismiss the Appellant's point of dispute in respect of the costs of work on documents on the basis that it had not been properly pleaded and that the failure to identify which items were in dispute, and why, did not allow the Respondent to prepare for the hearing.

The Appellant had instructed the Respondent firm to act on his behalf in respect of financial claims arising from the breakdown of his relationship with his former partner. On becoming dissatisfied with the service provided, he terminated the retainer and applied for detailed assessment of the Respondent's invoices pursuant to Part III of the Solicitors Act 1974. Proceedings progressed straightforwardly: directions were agreed, and the Appellant's costs draftsman attended the Respondent's office to inspect the files prior to preparation of the Points of Dispute. He professed himself to be content that he had seen all that he needed to see, and once the finalised Bill had been served, Points of Dispute were drafted. A detailed assessment hearing was listed 5 months after Replies had been served, with an agreed time estimate of 1.5 days.

Item 10 of the points of dispute concerned document work carried out over an 11 day period between 17 and 31 October 2017 by 6 fee earners. The Schedule to the bill comprised 32 timed entries, amounting to 46.8 hours of work. Item 10 within the points of dispute highlighted the time spent and continued *"…under any stretch of the imagination the level of time expended can in no way be justified and against the relevant test, the time expended, and its subsequent cost, must be deemed to be unusual in nature and amount… the Claimant is mindful of the requirements of the Civil Procedure Rules and to the need to keep Points of Dispute brief and succinct. It must therefore be stated that all entries are disputed. By way of general indication, however…the main issues with the document time are as follows…"*. 7 issues were identified, including duplication of work between fee earners, *"too much time claimed generally"* in respect of preparation and *"an excessive level of time claimed in relation to drafting of communications"*. The Point concluded, *"It can be confirmed that the above stated list is not exhaustive of the issues but provides a general overview as to the reason why the time claimed is unusual in nature and / or amount. The Claimant reserves their position generally."*

In the Replies, the Respondent stated that it *"could not provide any meaningful reply to this general point"*, and that *"in the absence of itemised points of dispute being served…the court will be asked to dismiss this point"*. The Appellant made no attempt to amend the points of dispute prior to the hearing; instead, on assessment, his costs draftsman invited the Master to take a 'broad brush approach' to reducing the time spent on documents. When asked which items were challenged, he stated that he would like to identify particular items – the biggest ones in terms of time spent – and explain why these were unreasonable, and would then invite the Chief Master to make reductions. The Chief Master was not prepared to do so, holding that this approach would place the Respondent in difficulties as it would not know which items were challenged until the challenge was made, that there was insufficient time for the detailed

examination of the documents that that approach would require in order for the Respondent to have the opportunity to respond in full, and that this was not work which should be carried out 'on the hoof' at the hearing. Nor was he prepared to adjourn the hearing in order to allow the Appellant time to file further Points of Dispute: there had been ample time for the Appellant to do so prior to the hearing, and it would be unjust and disproportionate to extend the detailed assessment to enable something to be done which ought to have been done in advance of the hearing.

His decision was challenged on the grounds that (i) it amounted to a strike out, but he was not referred to and did not consider CPR r.3.4; (ii) there was a failure to consider PD47 para 8.2 and Precedent G, which set out the form that points of dispute should take; (iii) that he struck out parts of the Points of Dispute despite the fact that they were adequately and properly pleaded, and that (iv) even if the Chief Master was correct that there was insufficient time at the hearing and the point was insufficiently pleaded, there were fairer courses of action that could have been taken, including adjourning the hearing and ordering the filing of further and more detailed Points of Dispute.

The Court of Appeal held:

1) That it was necessary to look to CPR Pt 47 for assistance in relation to the form that points of dispute should take, and to CPR PD 47 para 8.2 and Precedent G particularly. Para 8.2 provides that Precedent G should be followed 'as far 'as practicable' and made it absolutely clear that points of dispute should be short, to the point and focussed. General points and matters of principle which required consideration before individual items in the bill were addressed had to be identified, and then specific points had to be made "stating concisely the nature and grounds of dispute".

2) Both common sense and the requirement to deal with matters fairly, justly and proportionately dictate the points of dispute must be drafted in such a way as to enable the parties and the court to determine precisely what is in dispute and why. The recipient had to be placed in a position in which it could seek to justify the items in dispute. In the case of a solicitor and own client assessment, it was necessary to formulate points by reference to the presumptions set out at r. 46.9(3), to specify the specific items in the bill to which they related and to make clear in each case why the items were disputed.

3) In the instant case, the point of dispute was general in nature, stating that all items were disputed, that the list provided was not exhaustive but provided a general overview, and that the Appellant reserved his position generally. It did not contain cross-references to the numbers of items disputed on particular grounds and, as was accepted, it did not state why any item in the bill was disputed. It did not, therefore, comply with CPR PD47 para 8, nor did it take the form of Precedent G.

4) The costs judge was entitled to form the value judgment he did and to dismiss the assessment in relation to the particular point of dispute. The decision fell within the wide ambit of the court's discretion under r. 3.4(2)(b) and / or r. 3.4(2)(c).

5) Insofar as the submission that there was an 'absolute' right to an order for assessment of the bill and for a costs officer to assess the costs under s. 70 of the Solicitors 1974 was maintained (as it had been in the High Court, though it did not form part of the Grounds of Appeal), this was not correct: the right to assessment under the Act was inevitably subject to the rules and procedures of court which relate to the exercise of that right.

This is a sensible judgment which provides useful guidance for practitioners, particularly those tasked with the preparation of points of dispute. Plainly a balance must be struck between the competing needs to ensure that points of dispute are concise and focussed, whilst also providing sufficient detail so that both the parties and the court are able to discern precisely what is in dispute and why. In truth, this is not an onerous

or difficult task: in *Ainsworth*, very little additional work would have been required to render the material point compliant: the identification of perhaps half a dozen of the lengthier periods of time spent on document work and more specific criticism directed at those items, would have been sufficient to ensure compliance with 47PD.8 para 8.2 and, in all likelihood, to have persuaded the Chief Master to adopt the desired 'broad-brush' approach.

CAN A SOLICITOR TERMINATE A CFA IS THE CLIENT DOES NOT ACCEPT ADVICE ABOUT SETTLEMENT?

Katharine Scott

On 27 February 2020 Lord Justice Lewinson handed down a short judgment (with which Lord Justice David Richards and Lady Justice Rose agreed) in the case of *Butler v Bankside* [2020] EWCA Civ 203 in which he dismissed the appeal holding that the first instance judge was right to have determined the case in the way that he did, and for the reasons that he gave.

The facts

The case was concerned with the liability of Mrs Butler to pay costs to her legal advisors Bankside, pursuant to a CFA as between them, in circumstances where Bankside had terminated the retainer.

Mrs Butler had a claim for damages against Metris arising out of the termination of a commercial agency. Metris made an offer of settlement to Mrs Butler of €90,000. Bankside advised her to make a counter-offer of €90,000 plus 50 per cent of her costs. Mrs Butler did not respond to that advice. Bankside then wrote to her stating that if they did not receive final instructions by a specified deadline, they would treat their retainer as brought to an end in accordance with the CFA. Again, Mrs Butler did not respond. Bankside terminated the retainer; and Mrs Butler proceeded with her claim with different solicitors. Ultimately, she achieved an arbitration award of a little more than £40,000. Bankside presented her with a bill of costs the liability for which she disputed.

The CFA in issue was a standard form CFA made on Law Society terms and included a clause which entitled Bankside, on termination of their retainer in certain circumstances, to payment both of their basic charges and disbursements and also their success fee if Mrs Butler went on to win her claim.

The relevant provision of the CFA was as follows:

> *"We can end this agreement if you reject our opinion about making a settlement with your opponent."*

The argument at first instance and in the Court of Appeal

The argument made by Mrs Butler was that while there are two possible meanings to be given to the phrase: *"if you reject our opinion about making a settlement with your opponent."* – the *'broad meaning encompasses an opinion about the client making an offer'* and the narrow meaning which in practice was *'restricted to advising the client to accept an offer of settlement made by their opponent'* [paragraph 8] – the narrow meaning was to be preferred. On this analysis Mrs Butler argued that Bankside's right to terminate the CFA had not been triggered and consequently nor had her liability to pay their costs.

In support of this argument Mrs Bankside came up with five supporting arguments:

- *First, at common law, a solicitors' retainer is an entire contract. If solicitors do not complete the task for which they are retained, they are not entitled to be paid at all. …..*
- *Second, the broad interpretation would allow solicitors to drop out of a case simply because they and the client disagree about whether to make an opening offer, or when to make it, or how much to offer; yet still retain their entitlement to a success fee if the client goes on to win the case. The narrow interpretation would mean that the client cannot snatch a win from the grasp of the solicitor by turning down*

an acceptable offer. But if the client simply disagrees with the solicitors' advice about making an offer, the solicitors remain "locked in" until the conclusion of the case. If money is on the table, the solicitors should be entitled to their fee, but not otherwise.

- *Third, the benefits to a client who retains solicitors under a CFA in not making their own offer are small in comparison to the risk to such a client in refusing to accept an offer made by their opponent. So there is no reason for the CFA to enable solicitors, in effect, to compel the client to make an offer.*
- *Fourth, the broad interpretation sits ill with the circumstances that apply if the client decides to terminate the retainer. In that event the solicitors must elect between unconditional payment of basic charges and disbursements; or conditional payment of basic charges, disbursement and the success fee, but only if the client wins the case. If the client ultimately loses the case, the solicitors are not paid (although they will be entitled to disbursements). Clause (b) (iii) by contrast gives the solicitors an unconditional right to basic charges and disbursements plus the success fee in the event of a win. The solicitors, in that scenario, take no risk; and the potential entitlement to the success fee is pure upside.*
- *Fifth, if there is any doubt about the correct interpretation the doubt should be resolved in the client's favour because (a) the broader interpretation is onerous and draconian and (b) the solicitors (or what amounts to their trade union) were responsible for its drafting, and ambiguities should be resolved in favour of the consumer.*

The argument made by Bankside was that the phrase encompassed advice about settlement with an opponent, including advising the client to make their own settlement offer. On this analysis Mrs Butler's failure to respond[1] to their advice about making a counter-offer of settlement triggered their right to terminate the CFA.

The decision

Unsurprisingly the Court of Appeal had no hesitation in rejecting Mrs Bankside's arguments. In particular:

- The Court held that if the relevant clause was limited to the acceptance of an offer already made, the clause would have said so.
- In fact, the clause states *"We can end this agreement if you reject **our opinion** about making a settlement with your opponent"*, (emphasis added). These words make it clear that the clause extends to advice given to the client about making an offer that **may** lead to settlement.
- As the first instance Judge had pointed out *"one would not expect the level of protection which they are afforded against the whims of the unreasonably optimistic client to turn upon the random happenstance of whether or not the other side has made an approach which can be categorised as a contractual offer capable of acceptance."* That protection is, in essence, protection against the risk that if the client only makes a small recovery they will not be able to pay the additional costs incurred by the solicitors in pursuing the case to the bitter end.

Comment

The decision is unsurprising. The interpretation argued for by Mrs Butler was contrary to the words of the clause in issue and would have led to some bizarre results as both the first instance Judge and the Court of Appeal held.

That said, the Court did not engage with the concern Mrs Butler raised, that the broader interpretation of the phrase would allow an unscrupulous solicitor who loses the will to fight a case, to advise a client to make a very low offer in order to improve the prospects of recovering costs, with little risk to the solicitor. If the client accepted the advice, costs would be recovered.

[7] There was no discussion in the judgment as to whether failing to respond to advice was the same as rejecting advice. It is suggested that as it amounts to the same thing – i.e. a failure to accept the advice, nothing hangs on this.

If the client refused to take the advice, the solicitor could terminate the CFA and their right to recovery of costs would be triggered in the event that the client went on to win his/her claim. It is suggested that the Court of Appeal were right not to accede to this argument. The risk of a solicitor advising under-settlement is integral to a costs recovery scheme in which the solicitor (mainly) only gets paid if the client wins his/her claim. The protection for the client where a solicitor terminates the CFA because advice was not taken about settlement, arises from the fact that the solicitor will not get paid unless the client wins his/her claim. It is therefore not in the solicitor's interests to leave a client without effective legal representation is there is a decent claim.

DEPARTING FROM A COST BUDGET? THE HURDLE REMAINS HIGH

Samantha Jones

In the ongoing debate about the interpretation of what constitutes a good reason to depart from a costs budget, as per CPR 3.18(b), DJ Lumb has thrown his hat into the ring to provide a little more guidance as to when a party will succeed (or not) in making this argument.

In *Charlotte Chapman v Norfolk and Norwich University Hospitals NHS Foundation Trust* [unreported, case no. D33YJ774, dated 4 March 2020), DJ Lumb was required to determine what amounted to a "good reason to depart" from a budget in a costs management order during a Detailed Assessment of the Claimant's costs. The Claimant was successful in her claim for damages for clinical negligence and the case settled pre-trial at a stage where the budgetary spend for the Experts and ADR/settlement phases was incomplete.

DJ Lumb re-iterated the principles set down by the Court of Appeal in *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792, per Davis J namely that:

> *"where there is a proposed departure from the budget, upwards or downwards, the Court, on a Detailed Assessment, is empowered to sanction such a departure if it is satisfied that there is a good reason for doing so. That, of course, is a significant fetter on the Court having an unrestricted discretion: it is deliberately designed to be so. Costs Judges should therefore be expected not to adopt a lax or overindulgent approach to the need to find good reason, if only because to do so would tend to subvert one of the principal purposes of costs budgeting and against the overriding objective. Moreover, while the context and the wording of CPR rule 3.18(b) is different from that of CPR rule 3.9, relating to relief from sanctions, the robustness and relative rigour of approach to expect in that context, see Denton v TH White Limited [2014] EWCA Civ 906, can properly find at least some degree of reflection in the present context."*

and

> *"Nevertheless, all that said, the existence of the "good reason" provision gives a valuable and important safeguard in order to prevent real risk of injustice…"*

DJ Lumb interpreted the Court of Appeal's judgment that finding a good reason to depart from the budget would be a "high hurdle" for any party to overcome.

The Court of Appeal in *Harrison* was reluctant to provide any specific guidance or examples bar one (the application of the indemnity principle was a good reason to depart), preferring to leave it to Costs Judges to make their own appraisal and evaluation of each individual case. The case of *Chapman* has now provided us with a further example.

The judgment does not set out the parties' arguments in detail but it would appear that the argument made by the Defendant suggested that the Claimant's solicitors had been either overspending or costs building in the Experts and ADR phases to *"use up the allowance in the*

budget". DJ Lumb gave that submission short shrift. He found that in order for a party to be able to mount this argument there would be need to be *"very clear evidence of obvious overspending in a particular phase… before the Court could even begin to entertain arguments that there was a good reason to depart from the budgeted phase figure if the amount spent comes within the budget."* He stated that to approach the matter otherwise would be to undermine one of the principal purposes of cost budgeting, namely for the parties to have certainty of the amounts that they are likely to be able to recover or pay out. In his view, so long as the amount claimed came within the party's budget, it was not the role of the Costs Judge at Detailed Assessment to make a judgment-call on the proportion of the budgeted phase that a *"prudent receiving party would have incurred where that phase has not been completed."*

He further added that *"it follows that a complaint that the budget was set too generously or on too miserly a basis cannot, of itself, amount to a good reason to depart."*

DJ Lumb's interpretation of this point is contrary to that of HHJ Dight, sitting with Master Brown as an assessor, who gave judgment 14 months earlier in *Barts Health NHS Trust v Hilrie Rose Salmon* (2019, WL 01371497). In *Salmon*, HHJ Dight was asked to consider the same issue and determined that non-completion of budgeted work in any phase of the budget could amount to a good reason to depart from the budget for that phase and that it was open to a Costs Judge to hear submissions on what the appropriate figure should have been. DJ Lumb respectfully disagreed with HHJ Dight on the basis that that would mean that a party's failure to spend all of the budgeted sums in each phase would inevitably lead to an opening of the floodgates because all paying parties would seek to argue the matter at Detailed Assessment, contrary to the purposes of cost budgeting. Furthermore, he considered that it would create a *"perverse incentive to a prospective receiving party to overspend and marginally exceed every phase in order to avoid a Detailed Assessment"*. DJ Lumb re-iterated the Court of Appeal's statement in *Harrison* about the purpose of the provision in CPR 3.18(b), that it is *"an important safeguard against a real risk of injustice";* it is not simply a provision to be used to argue general points in respect of the budget but something which he deemed must amount to a *"specific and substantial point arising in the case"*.

It may be thought that DJ Lumb's decision pays greater heed to the underlying purpose of cost budgeting and the deference that must be paid to the costs management process. It also takes account of the practicalities and realities of the cases that so often settle where budgeted phases are not complete. It would surely undermine the certainty in costs budgeting and de-incentivise parties to settle where it could always be argued that a party who had not totally completed each budgeted phase was liable to have its budget reduced and a new figure determined by a Judge.

Only time will tell whether DJ Lumb has won this round of the argument. Without further guidance from the Court of Appeal, it continues to be open to parties to attempt to proffer new examples of where there are good reasons to depart from the budget. However, parties would do well to remember that the bar is a high one and there has to be real risk of injustice if they want to surmount it.

CAPPED COSTS PILOT SCHEME: THE FIRST EXAMPLE

Rachel Sullivan

The first case under the Capped Costs List pilot scheme has concluded, with the judge commenting on the procedure in the judgment.

Faiz v Burnley Borough Council [2020] EWHC 407 (Ch) concerned an application by the claimants for declaratory relief as to their rights in relation to a property. The property was owned by the defendant local authority, which had purported to exercise its right of forfeiture of the lease by peaceable re-entry in November 2019. The claimants maintained the local authority had waived its right of forfeiture, but the application was refused. The claimants were represented by leading and junior counsel and the defendant represented by leading counsel.

HHJ Halliwell, sitting as a High Court Judge, addressed the pilot scheme and the procedure followed in the case:

'27. *It is believed this is the first occasion on which proceedings subject to the Capped Costs List Pilot have reached trial. I shall thus make some observations about matters of procedure.*

28. *The Capped Costs List Pilot Scheme is governed by the provisions of CPR Practice Direction 51W. The Pilot is scheduled to last for two years having commenced on 14th January 2019 and it applies to the courts identified in PD51W Para 1.4. These include the London Circuit Commercial Court and courts now subsumed in the Business and Property Courts in Leeds and Manchester. It is a separate list, not a sub-list. Subject to the matters listed in Para 1.6(3), it is available for all cases to a value not exceeding £250,000 where the trial is expected to require no more than two days.*

29. *In the present case, the Claimants applied promptly for interim injunctive relief following the action taken by the Council to obtain peaceable re-entry. At that stage, it is unlikely the Claimants contemplated issuing proceedings in the Capped Costs List and, in any event, they did not have any realistic opportunity to raise this with the Council before issuing their application. At the hearing, on 22nd November 2019, of the Claimants' initial application, I granted them interim relief and fixed a return date on 3rd December 2019.*

30. *On the return date, the parties agreed to treat the hearing as the Case Management Conference. In view of the urgency of the case, it was listed for trial on 4th-5th February 2020 on the basis that the interim injunctive relief would continue until trial or earlier order. I canvassed with counsel the Capped Costs List Pilot Scheme and, ultimately, the parties together agreed to transfer the case to the Capped Costs List. Consistently with PD 51W Para 2.28 , the parties agreed to rely only on the documents contained in their bundles of core documents with no other directions for disclosure. A deadline was provided for the exchange of witness statements but, consistently with Para 2.33 , there were no directions for expert evidence. Having been allocated to the Capped Costs List, there was no provision for cost budgeting.*

31. *Although Para 2.31 provides for the parties to be limited to no more than two witnesses, agreement was reached that the Council should be permitted to call three witnesses. For reasons to which I shall refer later, I was satisfied that this was appropriate and, at the commencement of the trial, I thus made an order providing for the Council to have permission to do so.*

32. *A trial bundle was filed at Court amounting to 568 pages. Skeleton arguments were delivered in accordance with the Chancery Guide and the parties jointly prepared a Trial Timetable. At all stages, there was a significant degree of collaboration to ensure that the case was ready by the agreed trial date. For this, the parties are to be commended.*

33. *The trial occupied the Court for no more than two full days.'*

Features of the case which are likely to be of particular interest to practitioners are the speed at which proceedings came to trial following allocation to the Capped Costs List (within ten weeks of the initial application for injunctive relief being heard) and the court's willingness to apply the procedure flexibly. The defendants were permitted to call a third witness notwithstanding the provisions of the Practice Direction limiting witnesses to two per side, in part because the judge was satisfied that this would not require the trial to be extended beyond two days.

It would have been interesting to know the outcome in fact on costs in this case but unfortunately the judgment does not extend that far (perhaps unsurprisingly as the Pilot envisages a separate hearing for costs with schedules to be filed 21 days after the conclusion of the trial). The usual procedure on the Pilot is for costs to be summarily assessed (PD51W 3.2), and for a cap to apply to each stage of the claim. Conduct and Part 36 remain relevant on the Pilot too.

The pilot scheme will run until January 2021 on a voluntary basis in the pilot courts. It is confined to the High Court so effectively open to cases with a value between £100,000 - £250,000 except those which:

- Will require a trial of longer than two days (following appropriate case management).
- Involve allegations of fraud.
- Involve extensive disclosure and/or extensive witness or expert evidence.
- Involve numerous parties and numerous issues.

A total costs cap of £80,000 applies, with caps for individual stages.

The hope is that the Capped Costs List will streamline procedure, increase certainty as to costs, and speed up the resolution of claims. Some of those aspirations appear to be vindicated by this case but we await further decisions before any conclusions can be drawn.

CONTRIBUTORS

Marion Smith QC
marion.smith@39essex.com

Marion specialises in complex, high value commercial and construction disputes for UK and international clients. She has extensive experience litigating matters before domestic courts and tribunals as well as in international arbitration where she has appeared before institutional and ad hoc tribunals, including under the Rules of the ICC, LCIA, LMAA and the UNCITRAL Arbitration Rules. Marion is a Visiting Senior Lecturer in the School of International Arbitration, in the Centre for Commercial Law Studies, Queen Mary University of London and a Professional Fellow of Aston University. She has also lectured at the Singapore International Arbitration Academy, part of the National University of Singapore's Centre for International Law.Marion is ranked in Chambers and Partners in Construction and Legal 500 in Construction and Professional Negligence. Marion is also ranked in Construction in the Legal 500 Asia Pacific. To view full CV click here.

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.

Nicoa Greaney
nicola.greaney@39essex.com

Nicola advises on and appears at detailed assessment hearings and other costs cases in the Senior Court Costs Office and the County and High Courts on behalf of paying and receiving parties. She appears at cost budgeting hearings, including in group litigation, and is currently instructed to deal with costs matters in the Coal Coke Ovens Group Litigation. She has been involved in cases involving legal aid costs, including *R (Ali Zaki Mousa) v SSD* [2013] (set-off in legal aid cases) and costs applications against the Lord Chancellor. She recently acted in a high value costs dispute in the Court of Protection. She has experience of wasted costs applications and is currently instructed in a high profile wasted costs matter. She was successful in defending the Re Eastwood principle in the context of government costs (*Bakhtiyar v SSHD* (2015 UT)). She has recently been instructed in a dispute about disclosure of ATE policies and advised on DBA issues. She regularly lectures on costs issues including at

CONTRIBUTORS

the Association of Costs Lawyers conference. She is a member of the Attorney General's A Panel of Counsel. She is available to give advice and representation in a variety of costs cases. *"Extremely bright, thorough and thoughtful."* Chambers UK 2020. *"A great person to have around when the storm hits."* Legal 500 2020. *"A very clever barrister"* who *"provides no-fuss, responsive and pragmatic advice."* Chambers UK 2019. 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. He has been ranked as a leading junior in costs for many years. Shaman is ranked in Chambers & Partners for costs where he is described as: *"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."* (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 and is described as being *"clear, to the point and his advice is always solution focussed"* (2019), *"recommended for costs budgeting"* (2018). To view full CV click here.

Katherine Scott

katherine.scott@39essex.com

Katie advises and represents both Claimants and Defendants in a variety of costs issues before the courts and in arbitrations. She has advised on the enforceability of CFAs and CCFAs, the recoverability of success fees and insurance premiums, and on solicitor and own client disputes. She has been instructed by the Legal Services Commission in cases involving a variety of issues and has represented applicant solicitors at all stages of their disputes with the LSC, including appeals to the Contract Review Body and in Judicial Review proceedings. She has extensive experience of the new costs management regime and has appeared at a number of costs management hearings for both claimants and defendants. *"A professional and highly effective advocate."* The Legal 500. *"Forthright, efficient and good at managing her cases."* The Legal 500. *"She's very robust, extremely tenacious in court and she connects well with the clients." "She's incredibly good on her feet, completely unflappable and able to deal with tricky judges."* Chambers UK. *"She's very clever and confident in what she does." "She's thorough, alive to issues and robust."* Chambers UK. To view full CV click here.

Caroline Allen

caroline.allen@39essex.com

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

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.

Rachel Sullivan
rachel.sullivan@39essex.com

Rachel has a growing costs practice and regularly acts in costs hearings across her practice areas. She has successfully represented parties in cases concerning QOCS, costs against non-parties, and interim costs, as well as CCMCs. To view full CV click here.

Philippe Kuhn
philippe.kuhn@39essex.com

Philippe is building a broad practice across all areas of Chambers' specialisms. He has a particular interest in commercial matters with an international dimension (including arbitration, construction, shareholder, civil fraud, jurisdiction and choice of law disputes) and cases at the intersection of private and public law (including Human Rights Act damages and equality rights claims). This builds on his international background, growing up in Switzerland and Sri Lanka, before reading law at the LSE and Oxford and qualifying as a barrister in England. 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