39 Essex CHAMBERS

3+9=Costs

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Introduction

Shaman Kapoor
Call 1999

EDITOR

Welcome to the 7th Edition of 39 Essex Chambers' Costs Newsletter. We start with another celebration for the team as we congratulate **Nicola Greaney KC** on taking Silk – very well done indeed!

I'm not sure if celebration is the word when it comes to developments in the spheres of QOCS and fixed costs, but we do have new rules in relation to QOCS and, as to fixed costs, the horizon is clearing as we now have draft explanatory notes and draft rules for what lies ahead in October. (The rules for Part 36 will also be revised in October which at first sight reflect the changes in QOCS and Fixed Costs provisions elsewhere.)

In this issue, we take you through some recent case law on testing the bounds of the QOCS regime as we have known it (pre-April 2023): First, the High Court case of ***Chappell v Mrozek*** which considered whether an order reflecting the agreement between the parties as to the liability for costs following the late acceptance of a Part 36 offer was an "order" enabling enforcement (set-off) pursuant to the QOCS rules.

Second, the Court of Appeal case of ***University Hospitals of Derby & Burton NHS Foundation Trust v Harrison*** appears to have sealed the fate of arguments about the applicability of QOCS in relation to a situation where the court was obliged to determine whether permission should be given to accept a Part 36 offer made by the Defendant which included deductible benefits.

Third, back in the High Court, the case of ***Pathan v Commissioner of Police of the Metropolis*** considered the application of QOCS to a mixed claim, in circumstances where the personal injury claim was added by amendment late in the progress of the proceedings.

We then round up these cases and some others in an **overview** leading to the current position reflected in the new rules effective from 6 April 2023, for claims issued on or after that date. Old, new and in the meantime, transitional!

Aside from QOCS, we review a High Court appeal on the use of Guideline Hourly Rates at detailed assessment and the escalation of London 1 as a more useful starting point in what would otherwise have been a London 2 case: ***Harlow District Council v Powerrapid Limited.***

We look at ***Candey Limited v Crumpler & Or***, a case that ran to the Supreme Court which considered whether the residual equitable lien of a solicitor (ranking them first in relation to the discharge of their fees out of the litigation proceeds) was surrendered in circumstances where other measures of security had been introduced after the initial instruction.

To close the show, we leave you with a summary review of the upcoming rule changes in relation to **Tracks and Fixed Costs** expected in October 2023.

Happy reading!

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‘Feeling the way’ through QOCS

Peter Hurst
LLB MPhil FCIArb

Chappell v Mrozek
2022 EWHC 3147 (KB), Master Stevens

Decisions at Master level are not frequently reported because they are not binding. Occasionally, however, a case comes along which is of persuasive value. In this case there were two cross-applications to implement the terms of a settlement agreement between the parties in a personal injury claim. The applications were heard by Master Stevens who has immense experience, in practice, of this type of case. The claimant had suffered a serious road traffic accident on 16 December 2016 whilst riding his motorbike.

The Claimant’s application made pursuant to CPR 36.14, was to enforce the terms of a Part 36 compromise and to compel the Defendant to pay the settlement sum accepted by the Claimant on 16 February 2022. The Defendant’s application was to try and enable it to enforce its agreed entitlement to costs by way of set-off against damages, such enforcement being wholly resisted.

The Claimant had not accepted the Defendant’s settlement offer within the “relevant period” such that they were required to agree liabilities for costs with their opponent, or request that the court make a suitable order, after considering what would be just in all the circumstances of the case. The parties chose to agree the most usual order in such circumstances, as provided for in CPR 36.13 (5), allowing the defendant some costs, but the parties could not agree whether the QOCS provisions contained in CPR 44.14 prevented enforcement of any part of that costs liability by the defendant.

Both parties accepted that the Court of Appeal decision in *Howe v Motor Insurers’ Bureau* [2020] Costs LR 297 allowed for a defendant’s costs order to be set-off against an order for costs in the claimant’s favour. But the Supreme Court decision in *Adelekun v Ho* [2021] UKSC 43, removed the foundations for the earlier practice.

It should be noted that this judgment was given on 14 December 2022. Two days later, on 16 December 2022 the Court of Appeal handed down: *University Hospitals of Derby & Burton NHS Foundation Trust v Harrison* ([2022] EWCA Civ 1660, [2023] 4 W.L.R. 8, [2022] Costs L.R. 1823), which decided that an Order which provided that the Claimant should pay the Defendant’s costs from when the relevant period expired and that benefits paid to the Claimant since the offer was made should be deduced from the settlement sum, was not *“an Order for Damages and Interest made in favour of the Claimant”* within Rule 44.14(1). As a result, the Defendant could not enforce or set off the Costs Order in its favour against the settlement amount due to the Claimant. The CA indicated that the Civil Procedure Rules Committee had agreed to a proposed amendment to Rule 44.14(1) so that it covered *“agreements to pay”*.

The change was made by the Civil Procedure (Amendment) Rules2023 (SI 2023/105) with effect from 6 April 2023. The provision applies only to claims where the claim form is issued on or after 6 April 2023.

Returning to the judgment of Master Stevens, she accepted that the Court of Appeal decision in *Cartwright* and Supreme Court decision in *Adelekun* were both binding upon her and she therefore resisted any temptation to draft an order permitting the defendant to enforce the claimant’s agreed adverse costs liability against his settlement sum.

The Claimant contended that whilst the offeree can apply to enter judgment for the unpaid sum under CPR 36.14 (7), the resultant court order is not an *“order for damages and interest”,* but is a

completely different species of order, with a DNA more analogous to that of a Tomlin order.

The Defendant submitted that the ratio relied upon by the claimant in the cases of *Cartwright* and *Adelekun* did not assist him in avoiding an enforceable set-off of adverse costs against his damages. The Defendant also contended that the correct interpretation of CPR 44.14 required not simply reading the words, "… an order for damages" without applying any purposive construction to those words. Part 36 acceptances are, it was submitted, quite naturally orders for damages, as are judgments for the unpaid sum under CPR 36.14 (7), such that costs orders in the Defendant's favour can be offset against damages under QOCS rules.

Both parties asked the Master to imply markedly different meanings to words in the civil procedure rules in order to arrive at their respective interpretations which they said reflected the original policy intentions.

Master Stevens then considered at some length the policy making background behind QOCS and concluded that:

> *"Once again, the language used does not reference or allude to a situation where there has been late acceptance of a Part 36 offer, such that the QOCS shield should be broken. Of more significance, to my mind, is the fact that it is plain from the minutes that there had been circulation of previous draft QOCS rules to interested parties who had engaged extensively with the Ministry of Justice during a relatively lengthy and fluid consultation process. This involved significant rule redrafting effort, prior to the final draft rules being laid before Parliament. It is important, I feel, not to under-estimate with the benefit of hindsight, the seismic changes introduced by QOCS and the sense that all involved were "feeling their way" into a new era. The minutes imply that there was a scaling-back during the drafting process, which would have been understandable given the various concerns expressed by practitioners at the time about the viability of the market-place following these and other interlocking reforms."*

Turning next to the case law, the Master noted that the parties held diametrically opposed positions as to any precedent set by the two most important cases, those cases being the ones which the Government has cited in its recent consultation document proposing changes to QOCS: i.e. *Cartwright v Venduct Engineering Limited* [2018] EWCA CIV 1654; and *Adelekun v Ho (Association of Personal Injury Lawyers intervening)* [2021] UKSC 43.

The parties made lengthy submissions in respect of both cases. In the case of *Cartwright* the Master concluded that the line of reasoning adopted by Coulson LJ in reaching a determination on the position of Tomlin orders under CPR 44.14, was so interwoven with reasoning touching upon other types of settlement where the court had not conducted a judicial inquiry into the appropriate damages and interest components of the final court order, that his comments on Part 36 settlements did form part of the overall ratio of his judgment. His findings would be highly persuasive, not only because they emanate from a more senior court, but also because they were reflected in the later Supreme Court decision in *Adelekun*.

The Master had no difficulty with the construction of rule 44.14(1) reached by Coulson LJ in *Cartwright* and its applicability to Part 36 settlements. For completeness, she undertook a review of the findings in *Adelekun* as well.

The clear message the Master took from *Adelekun* was that the court was not prepared to imply or infer words into Part 44 to expand the scope for enforcement, where the brief wording of the rule might otherwise seem to produce an unfair result on occasion. There was no in depth examination of *Cartwright*, it seems that was because the Court of Appeal had chosen to follow the plain language of the rule without adornment, which was consistent with the construction adopted by the Supreme Court. The Supreme Court had

overturned the Court of Appeal in *Howe* on a purposive construction basis. The Master took the view that if the Supreme Court had considered the language of Part 44 was inconsistent with *Cartwright*, despite the parties not contesting it, they would have overturned that decision too as the decision was referenced when determining the correct construction of the rule overall. The Supreme Court did not consider it appropriate to add words to the QOCS scheme which was currently set out "with commendable brevity", to expand its scope, preferring that words should be given their straightforward meaning and any amplification or further finesses should only be introduced by the CPRC.

Although urged that the decisions in *Cartwright* and *Adelekun* were not directly on point in this case, the Master found herself bound by them. Accordingly, she adopted the drafting of the order attached to the Claimant's application notice, which made it clear that monies to be paid to the Claimant were the "settlement sum" agreed by the parties and that the costs order against the Claimant made in respect of late acceptance was not to be set-off against any part of the ordered sums in the Claimant's favour. The Defendant's application was dismissed.

Order, order! More QOCS and Part 36

Daniel Kozelko
Call 2018

Qualified One-Way Costs Shifting (QOCS) was once again before the appellate courts in *University Hospitals of Derby & Burton NHS Foundation Trust v Rebecca Harrison* [2022] EWCA Civ 1660. In this case the Court of Appeal considered whether an order made by a judge following a claimant's acceptance of a Part 36 offer was 'any order for damages and interest made in favour of the claimant' (as defined in CPR r.44.14). If it was, the defendant could set off its own costs incurred since the relevant period expired against the agreed sums due to the claimant.

On the facts, the claimant required permission under r36.11(3)(b) to accept the offer. Permission was given by an order which included provision under CPR r36.22(9) for the offer to be reduced by a sum equivalent to the deductible benefits paid to the claimant since the date of the offer. The question then arose whether this order was one falling within r44.14, such that the defendant's costs could be off set. At first instance the court said that it was not, albeit noting that such an outcome was 'extremely regrettable'.

The Court of Appeal (Coulson LJ, Stuart-Smith and Snowden LLJ agreeing) upheld the first instance decision. The defendant argued that, unlike other recent jurisprudence, this was not a Tomlin Order case and (crucially) the judge had changed the sum payable pursuant to the order to reflect the deduction under r36.22(9). This was rejected primarily because it did not actually provide a case where there was 'an order for damages and interest made in favour of the claimant'. Shortly, the order under r36.22(9) was the judge directing the one part of the offer be payable to the claimant, with the remainder to the DWP. It was not an order for damages.

Coulson LJ went on to consider further factors indicating in favour of this interpretation. First, if enforcement of the offer were required, it would have been under the specific CPR provisions for enforcing such an order (r36.14(7)). It would not have been enforcement of an order. Secondly, it would be an undue reliance on form over substance to take the specific facts requiring an order in this case as indicating the general approach (where an order is not required to accept a Part 36 offer). Thirdly, it would have undermined the policy considerations in favour of QOCS; in particular, it would have made parties lacking mental or legal capacity particularly vulnerable to offsetting where this would not arise in the general case. It could also conflict with the operation of provisional damages. Fourthly, Coulson LJ regarded the defendant's approach

as conflicting with the judgments in *Cartwright v Venduct Engineering Ltd* [2019] EWCA Civ 1654 and *Adelekun v Ho* [2021] UKSC 43.

As is explored elsewhere in this edition of the newsletter, significant changes have come in to force in the QOCS regime. Of note here is a change to r44.14 so that it reads 'any orders for or agreements to pay damages, costs, and interest'. At the time of this decision, the Court of Appeal were aware of the changes. Coulson LJ noted, first, that the change made no express reference to Part 36. Secondly, he noted that this change (at least arguably) would have meant set off was allowed in this case (as an agreement to pay damages). This was a further factor against the interpretation adopted by the defendants.

This case is important in demonstrating the limits of the old Part 36 rules; however, for claims issued on or after 6 April 2023 this position has been superseded. In the author's view, it seems unlikely that the lack of an express reference to Part 36 in the new r44.14 means that 'agreements to pay' do not extend to cases such as this. Going forwards the imperative on practitioners to carefully explain the effect of a Part 36 offer to claimants is much more pressing.

Pathan v Commissioner of Police of the Metropolis [2022] EWHC 3244 (KB)

The application of QOCS: a binary question

Samuel Burrett
Call 2013

In *Pathan v Commissioner of Police of the Metropolis* [2022] EWHC 3244 (KB), Bourne J had to resolve the question as to how qualified one-way costs shifting ('QOCS') applied to proceedings in which a claim for unlawful arrest and detention had been amended at a relatively late stage to include a claim for personal injury.

The background

The claimant was arrested in December 2017 and detained at a police station for 12 hours. In due course, she was released, and the police took no further action. In May 2019, she issued a claim alleging her arrest and detention were unlawful. The particulars of claim intimated that she had suffered an injury, but she did not pursue a claim for damages for personal injury.

Following the CCMC and a few months before trial, the claimant applied to amend her claim to include a claim for damages for personal injury, stating that she had suffered a depressive disorder associated with anxiety as a result of her arrest and attention. HHJ Roberts allowed the amendment at a hearing on 22 January 2021.

The decision at first instance

Following the trial which took place later that year, HHJ Saunders ruled that the arrest and detention were lawful, so the claim failed in its entirety. As to costs, he decided that they would follow the event and, therefore, the claimant would pay the defendant's costs of defending the action, subject to the effect of QOCS.

In which respect, the Judge ruled that up until the date of the amendment it was simply a "loss of liberty" case, but thereafter it was a personal injury case. As a result, he took the view that QOCS only applied to the latter period. Accordingly, he ordered that the defendant could only enforce the costs order up to the date of the amendment, but not after.

The relevant rules

By way of reminder, CPR 44.13 provides:

> "44.13 – (1) This Section applies to proceedings which include a claim for damages –
> (a) for personal injuries…

CPR 44.14(1) provides:

> "Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court

but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant."

CPR 44.15 provides:

"Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that –

a) the claimant has disclosed no reasonable grounds for bringing the proceedings…"

CPR 44.16(2) provides:

"Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where –

a) the proceedings include a claim where which is made for the financial benefit of a person other than the claimant or a dependant…; or
b) a claim is made for the benefit of the claimant other than a claim to which this Section applies.

The appeal

The claimant appealed HHJ Saunders' decision on the basis that it was wrong to determine that QOCS did not also apply to the period before the amendment. In short, the claimant argued that the wording of the above rules make clear that where there is a mixed claim, which includes a personal injury claim, QOCS applies to the entire proceedings, regardless of the fact that, as in this case, the personal injury claim was only added by amendment. In such a case, a just outcome may be achieved by applying the discretion in rule 44.16(2)(b), but that does not mean that QOCS does not apply to the period before the amendment.

The claimant relied on two authorities in support of that contention. First, *Brown v Commissioner of Police of the Metropolis* [2019] EWCA Civ 1724, which concerned the scope and effect of rule 44.16(2)(b) in proceedings where claims for damages for personal injury were brought alongside other claims. In particular, the claimant relied on paragraph 27 of *Brown* where Coulson LJ quoted the decision of Whipple J which the Court of Appeal was upholding:

"**49.** Thus, CPR r 44.16(2) applies in any proceedings where a claim has been made for damages for personal injuries as well as for something else (i.e., as well as a claim other than a claim for damages for personal injury). This is a 'mixed claim'.

50. Once that point is resolved, the construction of CPR r 44.16(2)(b) becomes clear. Mixed claims are within the scope of QOCS, by virtue of CPR r 44.13(1). But CPR r 44.16(2)(b) provides a mechanism to deal with mixed claims. The mechanism is quite simply to leave it to the court at the end of the case to decide whether, and if so to what extent, it is just to permit enforcement of a defendant's costs order."

Second, *Achille v Lawn Tennis Association Services Ltd* [2022] EWCA Civ 1407, which was a mixed claim where the personal injury claim was struck out as disclosing no reasonable basis, but other heads of loss remained in issue. The county court ordered the claimant to pay the costs of the personal injury claim and permitted enforcement pursuant to the QOCS exception in CPR 44.15. The claimant appealed on the basis that QOCS applies to "proceedings" which include a personal injury claim and the exception only applies where the entire "proceedings" are struck out (as opposed to the personal injury element only). The Court of Appeal allowed the appeal holding that "proceedings" had the same meaning in CPR 44.13 and CPR 44.15.

The decision on appeal

Having considered those authorities, Bourne J agreed with the Claimant that HHJ Saunders had erred in law by deciding that QOCS did not apply to the period before the amendment. He reasoned:

"**30.** The case of *Achille* is consistent with that conclusion. QOCS applied to all of the proceedings in that case, even after the personal injury claim had been struck out. It would therefore be logical for QOCS to apply to all of the proceedings in the present case, even before the addition of the personal injury claim.

31. Whether or not *Achille* compels that conclusion, I consider that the meaning of rule 44.13(1) is clear. **The QOCS regime, which includes certain layers of judicial discretion, applies if proceedings include a personal injury claim and does not apply if proceedings do not include a personal injury claim. That question, to be asked and answered when the judge considers what if any order to make relating to the enforcement of a costs order, is a binary question, in other words there are only two possible answers, which are "yes" and "no".** In the present case the proceedings included a personal injury claim and so the answer was yes. Moreover, that was indisputably so on the date when the judge made his order, making the position in this case clearer than it was in *Achille*. The QOCS regime therefore applied to the proceedings. With all due respect to the judge, who gave a careful and detailed judgment on the claim, he fell into error by ruling that QOCS was to be applied only to the proceedings occurring after the amendment." (emphasis added)

In response to the Defendant's argument that the above interpretation would encourage claimants to bolster weak claims by adding spurious personal injury claims to them at a late stage in the hope of obtaining costs protection, Bourne J said that the solution in mixed claims such as this lay in the exercise of the discretion in rule 44.16(2)(b). He cited Coulson LJ's judgment in *Brown* emphasising the need for flexibility in applying that discretion:

"**57.** But in such proceedings, the fact that there is a claim for damages in respect of personal injury, and a claim for damage to property, does not mean that the QOCS regime suddenly becomes irrelevant. On the contrary, I consider that, when dealing with costs at the conclusion of such a case, the fact that QOCS protection would have been available for the personal injury claim will be the starting point, and possibly the finishing point too, of any exercise of the judge's discretion on costs. If (unlike the present case) the proceedings can fairly be described in the round as a personal injury case then, unless there are exceptional features of the non-personal injury claims (such as gross exaggeration of the alternative car hire claim, or something similar), I would expect the judge deciding costs to endeavour to achieve a cost neutral result through the exercise of discretion. In this way, whilst it will obviously be a matter for the judge on the facts of the individual case, I consider it likely that, in most mixed claims of the type that I have described, QOCS protection will in one way or another continue to apply...

58. It is however important that flexibility is preserved. It would be wrong in principle to conclude that all mixed claims require discretion to be exercised in favour of the claimant, because that would lead to abuse, and the regular tacking on of a claim for personal injury damages (regardless of the strength or weakness of the claim itself) in all sorts of other kinds of litigation, just to hide behind the QOCS protection (as Foskett J warned in *Siddiqui* [2018] 4 WLR 62)."

Accordingly, Bourne J allowed the appeal, but remitted the question of whether it was just under CPR 44.16(2)(b) to permit enforcement of the pre-amendment costs to the county court, that issue having not been considered by HHJ Saunders because he had determined that QOCS did not apply to that period. Bourne J said that such an exercise would have required him to take non-enforcement as the starting point, given QOCS applied, and to consider the nature of the mixed claim bearing in mind the above observations of Coulson J in *Brown*.

Comment

The message from the decision is clear: if QOCS applies at all, it applies to everything. Claimants should, therefore, be reassured that QOCS will

apply notwithstanding that the personal injury element of a claim has only been introduced by amendment, even when very late on in proceedings. However, defendants ought equally to be reassured that the courts are very much alive to the potential abuse of QOCS and will readily permit enforcement of costs orders under rule 44.16(2)(b) where spurious personal injury claims are tacked on to other claims merely for the purpose of obtaining costs protection.

QOCS old and new

Judith Ayling KC
Call 1998 | Silk 2021

In the last few months there has been a minor deluge of cases about QOCS which make clear just how extensive its reach is, and there has been a very significant set of amendments to the rules.

It is worth going back to the basics (those basics in personal injury cases only of course, to consider the scope of CPR 44.13).

Until the rule change a court order for damages and interest in the Claimant's favour was required for the Defendant to be able to enforce a costs order in its favour, up to the aggregate amount of damages and interest due to the Claimant. No set-off of Defendant costs against Claimant costs was otherwise possible under CPR r.44.12. That was the combined effect of *Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654 and *Ho v Adelekun* [2021] UKSC 43. It is worth remembering that in *Cartwright* it was also held that a winning Defendant could enforce its costs out of the damages paid to the Claimant by losing Defendants.

What is a court order and when is it needed?

In *MRA v The Education Fellowship Board* [2022] EWHC 1069 (Master McCloud, 22 April 2022), the Master 'parked' the question of the possible difference in treatment between protected parties and non-protected parties – protected parties of course need the Court to approve the settlement – and whether it would be possible or proper to explore means of having an order approved which had been drafted to avoid the possibility of QOCS protection not applying where a court order for approval was needed. The real battleground between the parties was whether it was unjust for the Clamant to pay the Defendant's costs after the end of the 'relevant period' where a Part 36 offer had been accepted out of time – it was not.

In *Chappell v Mrozek* [2022] EWHC 2147 (KB) (Master Stevens, 14 December 2022), the Claimant accepted a Part 36 offer out of time and liability for costs was agreed – with the Claimant owing the Defendant some costs – but the parties could not agree if set-off was appropriate. The Court held that there was no **order** for damages and so there was no possibility of set-off under the QOCS rules. It rejected an argument that an order to compel payment was an order for damages. She pointed out that the Defendant still benefitted from its Part 36 offer because the Claimant's costs after the 21-day period were not recoverable and the trial costs were saved.

In *University Hospitals of Derby & Burton NHSFT v Rebecca Harrison* (APIL intervening) [2022] EWCA Civ 1660 (16 December 2022), the Defendant had made a Part 36 offer including deductible benefits which the Claimant wished to accept after the relevant period, the benefits had increased, and so the Court's permission was required under CPR r.36.11(3)(b). The Defendant argued that because there was an order identifying the amount of benefits to be deducted there was an order for damages. No, there was not, found the Court of Appeal. There was no judicial evaluation or assessment of what was due, just a mathematical calculation with an adjustment of the settlement. The Defendant was elevating form over substance. Coulson LJ also questioned the analysis whereby a vulnerable Claimant who needed Court approval for her award was in a worse QOCS position than a Claimant who did not.

In *Excalibur & Keswick Groundworks Ltd v McDonald* [2023] EWCA Civ 18 (17 January 2023), the Court of Appeal considered a case where the Claimant had discontinued on the day of trial. The Defendants had maintained from the outset that the case was riddled with inconsistencies and applied to set aside the notice of discontinuance and to strike out the claim on the basis that it obstructed the just disposal of proceedings, so triggering CPR r.44.15(c). No, said the Court of Appeal. QOCS is a is 'broad-based and mechanical scheme'. It was not appropriate to remove QOCS protection from the Claimant where there was no evidence of abuse of process, dishonesty or egregious conduct. A notice of discontinuance should not be approached differently in a QOCS case and powerful reasons would be needed to remove the substantive right to QOCS protection.

The Civil Procedure (Amendment) Rules 2023 set out that the new CPR r.44.14 that applies to claims issued on or after 6 April 2023 is:

1) *Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for, or agreements to pay or settle a claim for, damages, costs and interest made in favour of the claimant.*
2) *For the purposes of this Section, orders for costs include orders for costs deemed to have been made (either against the claimant or in favour of the claimant) as set out in rule 44.9.*
3) *Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.*
4) *Where enforcement is permitted against any order for costs made in favour of the claimant, rule 44.12 applies.*

There is a transitional provision: the amendment only applies to claims where proceedings are issued on or after 6 April 2023 (r.1(3)).

This amounts to a reversal of *Cartwright* and *Ho*. These are major changes. 'Deemed order' covers Part 36 settlement after issue. Other agreements to settle are plainly covered (including Part 36 offers accepted before issue).

Given that 6 April 2023 has passed, there is little point in debating the merits of a Claimant rushing to issue before the deadline – it would have been necessary to balance the risks of rushing to do so before the Claimant was ready, against the risks of the new rules. We will see…

Parties will need to be careful, given that two parallel regimes are now in force.

Hourly Rates: How and whether to challenge them on appeal

Daniel Laking
Call 2015

The case of *Harlow District Council v Powerrapid Limited* [2023] EWHC 586 (KB) provides some useful reminders about the limited nature of appeals in costs cases, as well as guidance on how, when and whether to challenge hourly rates on appeal.

Facts

The substantive case concerned a contested Compulsory Purchase Order ("CPO") application before a Planning Inspector. The Planning Inspector upheld Powerrapid's objection to issuing a CPO. The Secretary of State awarded Powerrapid its costs of the application. Powerrapid was represented by BDB Pitmans, a firm located in St James' Park (and thus attracting London 2 rates, Guideline Hourly Rates).

First instance decision

The costs came before Costs Judge Leonard for detailed assessment. At that assessment, he considered the 'pillars of wisdom' set out a

CPR r44.4(3). He determined that the case was factually complex, but it was accepted that it was not legally complex. Although the questions to be answered by the Planning Inquiry were simple, the task of answering them was not. Both sides had instructed Leading Counsel (albeit not assisted by juniors) and the inquiry involved considerations of planning policy, development potential, demand, the benefits for the local community and valuation which were not straightforward.

The judge determined hourly rates with some limited regard to the Guideline Hourly Rates. He found the litigation was *"…not routine. It is a very specific sort of work. It is quite difficult and specialised. It gives rise to very specific issues. It requires very specific skills for which parties can expect to pay, I think, quite substantial fees."* Accordingly, he found London 1 rates *"rather more useful as a reference point"* compared with London 2.

Appeal

On appeal, Harlow District Council submitted that the Judge erred in finding that a Planning Inquiry dealing with an objection to a CPO was *"difficult and specialised"*. The Judge also erred, Harlow DC said, in rejecting the GHR, for providing no reasons for doing so and ultimately concluding that London 1 rates were more useful as a starting point.

Mr Justice Choudhury dismissed Harlow's appeal. He accepted the Judge's conclusion that planning cases can be "difficult and specialised". The mere fact that Planning Inspectors were not legally qualified did not mean that the work was not demanding and complex.

Similarly, Choudhury J dismissed the challenge on the basis of the GHRs. He reiterated that the Guide to the Summary Assessment of Costs is intended to be a starting point in summary assessment and *"**may** be a useful as a starting point in a detailed assessment."* He relied on the Master of the Rolls' introduction to the 2021 edition of the Guide:

> *"I would emphasise that the Guide is, as it has always been, no more than a guide and a starting point for judges carrying out summary assessment. This Guide is no different to its predecessors in that it continues to offer assistance to Judges. In every case, a proper exercise of judicial discretion has still to be made, after argument on the issues has been heard."*

It was open to the Costs Judge to conclude that the GHRs were not particularly helpful to indicate a reasonable hourly rate. Choudhury J gave some helpful guidance about the applicability of the GHRs at [88]:

> *"London 2 therefore encompasses all manner of work from the most straightforward and simple of cases to work that is legally highly specialised and difficult. Some work fitting the latter description might well be considered by a costs judge to warrant a considerable uplift from the London 2 starting point notwithstanding the fact that it does not amount (in terms of volume or value) to "very heavy commercial or corporate" work. In other words, the GHR do not dictate that London 1 rates are reserved exclusively for very heavy commercial or corporate work."*

Accordingly, the challenge to the hourly rates was dismissed on appeal.

Comment

This case provides a salutary lesson on the difficulties in challenging costs assessments on appeal. As Choudhury J set out, there is a heavy burden on parties to establish *"that the judge's decision falls outside the discretion in relation to costs conferred upon him under rule 44.3(1) of the Civil Procedure Rules 1998. For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion very widely"* (see the judgment of *Wilson LJ in Finance v Bolton* [2002] EWCA Civ 56).

Parties should think very carefully about whether their appeal raises genuine issues of principle

or whether it is simply an attempt to allow *"yet another trawl through the bill"* (see Buckley J in *Mealing McLeod v Common Professional Examination Board* [2000] 2 Costs LR 223). The latter will not be permitted. The role of the Appellate Court is limited to assessing whether the conclusions of the Costs Judge exceeded the generous ambit of their discretion.

In respect of hourly rates themselves, we all must remember that the GHRs are guidelines for summary assessment. Departing from them is permissible on detailed assessment and an appeal will not be successful for the simple reason that the Costs Judge on assessment allowed a rate in excess of those in the GHRs. Costs Judges are not bound to take the same approach to the GHRs on detailed assessment as they would in summary assessment and it is open to Judges to conclude that, in particular types of cases, the GHRs are not helpful.

Finally, it was held that the rates for the Planning Team should be the same as the rates of the Litigation Team within DBD Pitmans notwithstanding that the litigation team's work was simpler. Parties should be wary of seeking differing hourly rates for different types of work within the same firm. As Choudhury J stated: *"the general position is that rates are assessed for a firm and are not reassessed for different stages of litigation" and there is "no expectation that a litigant should change firms and use a different (cheaper) firm for a smaller and simpler aspect of the work."*

Overall, this case provides a reminder of the limited nature of appeals from detailed assessment. In short, unless there is a key point of principle, you may face an uphill struggle.

Solicitors to be open with their clients as to the terms of the retainer and any variations agreed

Simon Browne KC
Call 1982 | Silk 2011

If solicitors take additional security which is inconsistent with a lien over the proceeds and do not explain that the lien is being retained, then it is likely to be reasonable to infer that the lien is surrendered..

***Candey Ltd (Appellant) v Crumpler and another (as Joint Liquidators of Peak Hotels and Resorts Ltd (In Liquidation)) (Respondent)* [2023] 1 W.L.R. 342**

Background

In this case, Candey Ltd ("Candey") acted as a solicitor for Peak Hotels & Resorts Ltd ("PHRL") between April 2014 and March 2016 in respect of worldwide litigation and various other matters. One such matter was an action in the High Court in London, referred to as "the London Litigation".

On 21 October 2015, PHRL entered into a fixed fee agreement with Candey, under which Candey agreed to continue to act for PHRL in return for a fixed fee (the "Fixed Fee"). Payment of the Fixed Fee was deferred until the handing down of judgment on liability or settlement of the London Litigation, PHRL entering an insolvency process, or PHRL receiving funds. A deed of charge (the "Deed of Charge") was entered into on the same day as the fixed fee agreement, which granted a floating charge over PHRL's assets.

PHRL was placed into liquidation in the British Virgin Islands on 8 February 2016. The Respondents (the "Liquidators") were appointed by the BVI court as liquidators of PHRL. The Fixed Fee became payable and Candey lodged a proof of debt.

The London Litigation was settled by PHRL shortly before trial and Candey was dis-instructed by the Liquidators on 3 March 2016. The monies PHRL received in relation to the settlement were referred to collectively as the "Settlement Proceeds".

Candey contended that its outstanding fees were payable in priority to sums payable to other creditors in PHRL's liquidation and asserted an equitable lien over sums of money recovered or preserved in the course of the London Litigation. As many readers will be aware, this lien is a form of security that arises by operation of equity for solicitors to be paid their proper fees for the successful conduct of litigation out of the money the client recovers or preserves through that litigation (or its settlement). Candey also argued that the lien ought to be converted to a charge over that money under section 73 of the Solicitors Act 1974 (the "1974 Act").

Of importance in this case was that the deputy judge found that Candey had waived its entitlement to an equitable lien when it renegotiated its retainer and accepted additional security for its fees in October 2015. The Court of Appeal agreed with the deputy judge on this point. Candey appealed to the Supreme Court.

Legal principles

The Supreme Court held that whether a solicitor's equitable lien has been waived depends on the intention of the parties. The question is whether it is to be inferred that it was the intention of the parties that the lien should no longer exist. The intention must be assessed objectively in light of all the circumstances. Where solicitors take additional security, a relevant factor will be to what extent the taking of new security is inconsistent with the lien. A further relevant factor is whether, considering the professional relationship between solicitors and their clients, the solicitors explained to the clients that they were reserving their rights to an equitable lien. The authorities illustrate that if solicitors take additional security which is inconsistent with the lien and do not explain that the lien is being retained, then it is likely to be reasonable to infer that the lien is surrendered. This is particularly so where the solicitors take new security over the same property that the lien would apply to.

Application to the facts

Applying these principles to the present case, the fixed fee agreement and the Deed of Charge form a package of rights and obligations and new security arrangements which were inconsistent with the equitable lien on two grounds. First, the new security created by the Deed of Charge extended over the same property as the equitable lien would do (being the Settlement Proceeds). This was regardless of the fact that the Deed of Charge also covered other property. Second, the fixed fee agreement and the Deed of Charge expressly conferred priority, in the event of insolvency, to one of PHRL's backers, and therefore created different priorities than that of an equitable lien which would have ranked the solicitors first. However, the provisions in the fixed fee agreement for the earning and securing of interest on the Fixed Fee were not inconsistent with an equitable lien.

The Client taking Independent Legal Advice does not preserve the lien without express notice

An important matter arising from this case is that the professional obligation on solicitors is to give express notice if they intend to retain an equitable lien where the new security is inconsistent with the lien; such a duty is not displaced by the client obtaining independent legal advice. Therefore, the fact that Candey required PHRL to take independent legal advice in relation to the fixed fee agreement and the Deed of Charge did not change the court's conclusion.

There was no express or implied assertion in the fixed fee agreement or the Deed of Charge that Candey reserved its lien. The Court of Appeal was therefore entitled to find that Candey's equitable lien was waived when the parties entered into the fixed fee agreement and the Deed of Charge and the appeal was dismissed unanimously by the Supreme Court.

Expected changes on the horizon: Tracks and Fixed Costs from October 2023

Shaman Kapoor
Call 1999

What is set out below is a summary of the general framework of changes to be expected in October 2023 based on the Draft Rules published on 20 April 2023. Obviously, there will be no substitute for referring to the specific rules when they are in final form.

Tracks and Case Management

There will be four tracks: Small Claims, Fast, Intermediate and Multi-Track.

The filing of the Defence will trigger a notice of proposed allocation.

Claims under £10,000 (save for some landlord and tenant cases) and personal injury claims (generally) less than £5,000 remain the reserve of the Small Claims Track. Some road traffic accident and personal injury claims including certain claims made by protected parties are excluded from the Small Claims Track. If the proposed track is other than the Small Claims Track, the parties will then be obliged to file proposed directions. Save for road traffic, personal injury and housing disrepair claims, if the parties agree, the claim will be referred to the mediation service. Otherwise, the case will be allocated to track.

The Fast Track and Intermediate Track will have complexity bands (1-4), with 4 being the more complex. Decisions about Track will be "allocation" decisions, and decisions about Band will be "assignment" decisions. The Directions Questionnaire will ask the parties to suggest both track and band (the rules set out tables in Part 26 to offer some guidance on assignment).

The Fast Track will be the reserve for claims where monetary relief does not exceed £25,000, but subject always to the court considering that the trial will not last longer than one day and oral expert evidence will be limited to one expert per party per expert field, limited to two expert fields.

It is difficult to understand how a trial could be conducted in a single day if it is to include evidence of fact from at least one witness (which seems inevitable) as well as hearing from potentially four expert witnesses followed by submissions and judgment. Case management Judges will need to strike a fair balance between managing and controlling cost through allocation and being realistic (and fair to the recovery of preparation costs) about track allocation when the factor of trial time estimate alone would suggest more than one day is required.

The Intermediate Track will be the reserve for claims where monetary relief does not exceed £100,000, subject to the court considering that the trial will not last longer than three days and oral expert evidence will *likely* be limited to two experts per party. It is to be the normal track where the claim is brought by or against one or two claimant(s)/defendant(s). If there is an additional non-monetary element, it will only be allocated to the Intermediate Track if the Court also considers it to be in the interests of justice to do so. CMCs will be listed, and PTRs may be listed in Intermediate Track cases. Witness statements will be limited to 30 pages and expert reports (excluding attachment) will be limited to 20 pages.

It is not clear why there is an additional consideration in relation to claims of monetary and non-monetary relief if the criteria is met in all other already stated respects.

The Multi-Track will be the track for all other claims. It will also be the track for claims including mesothelioma, asbestos lung disease claims, clinical negligence (unless both breach of duty and

causation have been admitted), harm, abuse or neglect of or by children or vulnerable adults, some claims against the police and claims which could be tried by jury.

We can expect to see hearings listed to deal with either or both, and an expectation of a greater importance being attached to, allocation and now assignment as each will sound out in different recoverable costs on a given scale (currently marked at Table 12 and 14 of PD 45). Reallocation, whether by application or on the court's own motion, will be limited to exceptional reasons justifying the same. Reassignment will be limited to a change of circumstances justifying reassignment.

Fixed Costs

Many of the features of fixed costs are preserved and thus expanded across the broader width of cases to which these provisions will apply. Litigants in person are restricted to 2/3 of the fixed recoverable costs which would otherwise have been recoverable. There are provisions for multiple claimants, defendants' costs and counterclaims which will require specific examination when relevant. Importantly, claims for costs in excess of fixed recoverable costs remain subject to the "exceptional circumstances" threshold with no further clarification of what that might or should mean, save that vulnerability requiring additional work in excess of 20% of the fixed recoverable costs is a mandatory set of circumstances for the court to *consider* (as distinct from granting) a claim for costs in excess of the fixed recoverable costs.

If excess costs are permitted and come to be assessed, if the excess is no greater than 20% of the fixed recoverable costs, the court will award the lesser of either the fixed recoverable costs or the assessed costs. If excess costs are claimed but not permitted, the court can make "no order" as to the costs only proceedings or detailed assessment or make an order for some or all of such costs to be paid by the party making the claim.

A new weapon of "unreasonable behaviour" is being introduced as an application for either party to consider. It is defined as conduct for which there is no reasonable explanation. If a receiving party is found to have behaved unreasonably, their claim for costs can be reduced by an amount equivalent to 50% of the fixed recoverable costs otherwise payable. Conversely, if a paying party is found to have behaved unreasonably, the amount of payable fixed recoverable costs can be increased by an amount equivalent to 50%. Interestingly, the language chosen does not suggest a scale or discretion "up to" 50% – it seems to be intended to be a blunt weapon. Moreover, there are no equivalent provisions for punitive costs if such an application is made but fails, which might suggest this provision could become a weapon of choice more routinely.

The draft Rules make clear that where there is reallocation to a different track or complexity band, the applicable costs which may be allowed are those to which the claim is reallocated, as if it had been allocated to that track at the outset. Whilst this will be welcome in upwardly mobile claims, this is an immensely dangerous retrospective guillotine in downwardly mobile claims that may have been overexaggerated in terms of value or complexity in the early stages of the proceedings. The importance of a measured, balanced and realistic approach to case management by the parties cannot be overstated.

In relation to Fast Track and Intermediate Track, the applicable fixed costs depend on the complexity band, and in cases which include (or comprise entirely of) non-monetary value, the band designation prescribes an amount to the non-monetary value so that fixed costs can be calculated.

In the Intermediate Track, costs are allocated to each stage of the proceedings coded through 15 different stages "S1 – S15" with a different applicable fee depending on the Band.

Whilst these are sweeping changes to be

implemented from 1 October 2023, there are two triggering exceptions:

(i) in personal injury claims, the new fixed recoverable costs apply only to causes of action accruing after 1 October 2023; and

(ii) in disease claims, the new fixed recoverable costs will apply only where the letter of claim is sent after 1 October 2023.

Moreover, fixed recoverable costs will not (yet) apply to:

- Housing claims (a 2-year delay to implementation is expected); and
- Low value clinical negligence claims (see above as to multi-track).

We are told that the fixed recoverable costs have been adjusted for inflation and there appears to be an intention to review the fixed recoverable costs every three years in the future. However, what is clear is that the rates in place at the date when the claim is issued are to be the rates to be utilised for the duration of the case. This seems like a half-hearted attempt to address inflation at all, and, if one assumes three years pass from date of issue to trial, chances are that rates recovered will be at least three years out of date.

Part 45 just got longer!

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Simon is listed as a Band 1 Silk in costs and litigation funding. In addition to dealing with costs in commercial litigation and advising on litigation funding, Simon has a formidable reputation regarding costs in Group Litigation, be it for the claimant group or defendants. He has advised and conducted advocacy in the Civil Phone Hacking litigation concerning News of the World and the Mirror Group, the Construction Industry Vetting Litigation, The Truck Cartel Claims in the Competition Tribunal, the Sub-Postmaster claims against the Post Office, the Iraqi Civilian Claims against the MoD, the Grenfell Inquiry, and the Hillsborough Misfeasance Claims. He also advises upon CFAs, DBAs, litigation funding and LEI. He is appointed to sit as a Barrister Costs Assessor in the High Court and on the Cost Committee of the Civil Justice Council.

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

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

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Sam practises across the range of chambers' civil liability work, specialising principally in costs, personal injury, clinical negligence, commercial and sports matters. He also has a particular expertise in public inquiries and investigations and is currently instructed as junior counsel to the Grenfell Tower Inquiry. He is a member of Chambers' specialist costs team. He is frequently instructed to advise in 'between the parties' and 'solicitor own client' costs disputes and to represent in detailed assessment hearings and related applications. He has particular expertise with issues concerning enforceability of retainers, misconduct applications under CPR 44.11 and the operation of the fixed recoverable costs regime. He is also experienced in the range of costs matters associated with civil litigation, including costs and case management conferences (CCMCs), wasted costs and indemnity costs applications, Part 36 offers, and exceptions to qualified one-way cost shifting.

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

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Daniel accepts instructions in a variety of costs matters, and regularly appears in the County Court in cases raising costs issues. His costs practice also reaches across various areas of Chambers practice, including costs disputes in planning and regulatory matters. While a Judicial Assistant at the Supreme Court, Daniel worked on a number of costs cases including *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36. Daniel has also recently been involved in providing costs training to medical defence insurers.

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

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

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