Essex CHAMBERS

3+9=Costs
November 2023

Introduction

Shaman Kapoor
Call 1999

EDITOR

Welcome to the 8th Edition of 3 + 9 = Costs. We start with a huge thankyou to **Peter Hurst** for his tremendous leadership and contribution over the past decade as head of our Costs Group. Peter has decided to step down from this role and the Cost Group will now be jointly led by Vikram Sachdeva KC and myself. As a Group, we go from strength to strength as evidenced by the recent round of Directory rankings, and we remain extremely grateful for the positive feedback from clients and referees.

On to content! In this edition we have a concise summary of the Supreme Court split-decision on ***R (on the application of Paccar Inc and others) v Competition Appeal Tribunal and others*** which is likely to shape a lot of behind-the-scenes advice and drafting that we are being instructed on.

Sticking with retainers, we update you on the Court of Appeal decision in ***Diag v Volterra*** which considered the status of an unenforceable discounted CFA, in the light of arguments about severance, quantum meruit and claims for repayment of monies paid on account. If anyone thought that *Lexlaw Ltd v Zuberi* showed a softening of the Court's approach to the regulatory regime on contingent retainers generally, then Court of Appeal have put that right.

The Bar's retainers were also brought in to focus in ***Glaser v Atay***, where the barristers had been instructed on a direct access basis and the fairness of the terms of their staged retainer in the

event of an adjournment came under scrutiny by the High Court.

The costs world never being far from ingenious argument, we report on ***Brassington v Knights Professional Service Limited***, which was a case where a law firm sued its own former employee – also a Court appointed Deputy – for the shortfall in the recovery of the firm's fees which could not be billed or recovered from the protected party. The High Court reflected on agency principles and drew analogy to litigants in person before pointing to the need for informed consent in any event.

From retainers, we jump to damages: what is the current approach in a "mixed claim" otherwise subject to QOCS? We review the recent High Court decision in ***Afriyie v Commissioner of Police for the City of London*** and analyse the "in the round" and "exceptional features" thresholds.

Finally, we review a case in the Administrative Court which looked at the definition of "success" for the purposes of making a costs order in judicial review proceedings, in the case of ***R (City Portfolio Limited) v Lancaster City Council***. The High Court considered, amongst other things, the causal connection between the relief sought and the out-of-litigation resolution which left the proceedings academic, save for costs.

Plenty to read. May be a couple of Halloween frights in here too!

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R (on the application of Paccar Inc and others) v Competition Appeal Tribunal and others [2023] UKSC 28

Peter Hurst
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On appeal from: [2021] EWCA Civ 299

Lord Sales (with whom Lord Reed P., Lord Leggatt and Lord Stephens agreed) gave the lead judgment.

The issue before the Court was whether litigation funding agreements ("LFAs") constituted "damages-based agreements" ("DBAs"). This depended on whether litigation funding fell within the definition of "claims management services" in the applicable legislation, which includes "the provision of financial services or assistance". If the LFAs were DBAs within the meaning of the relevant legislation, they were unenforceable and unlawful since they did not comply with the formal requirements for such agreements.

The background to this appeal concerned two applications to bring collective proceedings for breaches of competition law under section 49B of the Competition Act 1998. The second respondent ("UKTC") and the third respondent ("the RHA") each sought an order from the Competition Appeal Tribunal ("CAT") to enable them to bring collective proceedings on behalf of persons who acquired trucks from the appellants (collectively, "DAF") and other truck manufacturers. Compensation was sought for loss caused by an unlawful arrangement between DAF and other manufacturers in breach of European competition law. It was alleged that the prices paid for trucks were inflated as a result of the infringement.

The RHA's application was for an "opt-in" collective proceedings order. UKTC's application was for an "opt-out" collective proceedings order. UKTC made an application for an opt-in proceedings order in the alternative. In order to obtain a collective proceedings order from the CAT, each of UKTC and the RHA needed to be able to show that it had adequate funding arrangements in place to meet its own costs and any adverse costs order made against it. Each relied on an opt-in LFA and UKTC had an alternative opt-out LFA. The funders under the RHA LFA were called "Therium" by Lord Sales. The funder under the UKTC LFAs was Yarcombe Ltd. Under each LFA the funder's maximum remuneration was calculated with reference to a percentage of the damages ultimately recovered in the litigation. UKTC and the RHA maintained that these LFAs were lawful and effective funding agreements. The truck manufacturers maintained that the LFAs constituted DBAs within the meaning of section 58AA of the Courts and Legal Services Act 1990 and were unenforceable because they did not comply with formality requirements made applicable by that provision. If this was right, the practical consequence would be that there was no proper basis on which a collective proceedings order could be made by the CAT in favour of UKTC or the RHA, based on the LFAs as they currently stood.

The CAT (Roth J and two others) ruled that the LFAs were not DBAs within the meaning of section 58AA, and consequently found that they were lawful and enforceable funding arrangements.[1]

On judicial review (the CA having decided it had no jurisdiction to hear an appeal) the Divisional Court agreed with the CAT's interpretation of section 58AA. Henderson LJ gave the sole substantive judgment, with which Singh and Carr LJJ agreed.[2]

The appellants appealed directly to the Supreme Court against that determination of their judicial review claim under the leap-frog procedure. The Association of Litigation Funders of England & Wales intervened, with permission granted by the Supreme Court, to make written submissions.

1 [2019] CAT 26.
2 [2021] EWCA Civ 299.

Lord Sales reviewed the case law and the statutory provisions:

- The Compensation Act 2006
- The Financial Services and Markets Act 2000
- The Courts and Legal Services Act 1990 (as amended).

The assumption had been made that third party funding arrangements, which assign an essentially passive role to the funders in relation to the conduct of the litigation, were not DBAs within the meaning of section 58AA, were not contrary to public policy, and so were enforceable as ordinary binding contractual arrangements. The court was told that if LFAs of this kind, whereby the third-party funders played no active part in the conduct of the litigation but were remunerated by receiving a share of any compensation recovered by their client, were DBAs, the likely consequence in practice would be that most third party litigation funding agreements would be unenforceable as the law currently stands.

Lord Sales then considered the judgment of Henderson LJ in the Divisional Court. That court concluded that the CAT had been right to construe the words in section 4(2) of the 2006 Act as applying "in the context of the management of a claim". Henderson LJ gave two main reasons for this. First, Parliament had already enacted a comprehensive scheme for the regulation of litigation funding agreements by way of section 58B, even though it had not been brought into force, and it was most improbable that Parliament would have intended to bring such agreements within the ambit of the regulation of claims management services by a side-wind. Secondly, the structure of the definition of "claims management services" in section 4(2) and (3) of the 2006 Act, with a primary limb in section 4(2)(b) ("advice or other services in relation to the making of a claim", broadly defined) which was extended by subsection (3)(a) in various ways, meant that it was appropriate to have regard to "the potency of the term defined", meaning that the definition should itself be coloured by the reference to "claims management" in the phrase being defined.

Lord Sales held that Henderson LJ's assessment of the context and purpose of Part 2 of the 2006 Act was not sustainable. He inferred there was an intention to regulate "claims intermediaries" and no one else, but that was not a concept used in the Act itself, nor was it a clear concept, nor was it used or defined in any precise way in the BRTF[3] report or the Explanatory Notes. The scheme of Part 2 of the 2006 Act was to regulate activities, not persons of a particular description. The language used in section 4 and in the Scope Order to describe the services which might be or were regulated was not appropriate to describe what a claims intermediary does.

Lord Sales did not consider that the existence of section 58B on the statute book had the significance which Henderson LJ accorded it. Section 58B was a comparatively blunt instrument which was focused on regulating particular persons identified as funders, whereas the power to regulate under section 4 of the 2006 Act was focused on regulation of service activities and was intended to be wide and highly flexible, allowing the Secretary of State to target regulation more precisely as and when particular needs were identified. Section 4 allowed for regulation of the provision of financial services or assistance to be integrated, if appropriate, into a coherent package of regulation covering also other forms of service provision with which they might be associated. If brought into effect, section 58B would impose a limitation which was not applicable where the Secretary of State regulates pursuant to section 4: see section 58B(3)(c). Section 58B was put on the statute book in 1999 (albeit not brought into effect) as a means of permitting litigation funding by exempting it from the common law rules against champerty on a very limited basis, where damages-based remuneration would not be permitted, but only remuneration calculated with reference to the funder's costs: section 58B(3)

3 Better Regulation Task Force

(e). That limitation was bypassed by development of the common law in *Factortame (No 8)*[4] and *Arkin,*[5] which confirmed that third party funding arrangements of the kind at issue in these proceedings were not champertous and hence were enforceable. Section 58B was not designed to regulate third party funding arrangements based on taking a share of the sum recovered of the kind which had been developed in the wake of those decisions, nor was it appropriate for that purpose. By the time of the enactment of the 2006 Act it was clear that, contrary to the view of the Divisional Court, section 58B did not provide a comprehensive scheme of regulation for litigation funders.

Accordingly, it could be seen that section 4 of the 2006 Act and section 58B did not operate in the same way. Section 4 was designed to address a world of third-party funding which had developed in significant ways beyond that for which section 58B had been devised. Section 4 had a different purpose and function. Furthermore, there was nothing inherently untoward in this. The statute book was not neat and tidy and there was no particular reason why statutory powers contained in different enactments should be regarded as mutually exclusive. Parliament had included the reference to "financial services or assistance" in section 4 simply as one type of services within the purview of the general regulatory power conferred by that provision, where it might be found to make sense in future to regulate them from the perspective of section 4 (potentially alongside other services) without reference to section 58B.

Lord Sales concluded that the statutory purpose of Part 2 of the 2006 Act was to provide a broad power to allow the Secretary of State to decide what targeted regulatory response might be required from time to time as information emerged about what was then a new and developing field of service provision to encourage or facilitate litigation, where the business structures were opaque and poorly understood at the time of enactment. The wide language used in section 4, and the degree of parliamentary control for the future exercise of the section 4 power, which is a feature of the scheme of Part 2, were strong indications of this. The Explanatory Notes also indicated that this was the purpose of the provision. Viewed in this light, there was good reason to think that Parliament used wide language in section 4 deliberately and with the intention that the words of the definition of "claims management services" should be given their natural meaning.

Lady Rose gave a lengthy and powerful dissenting judgment, concluding:

> "254. I therefore conclude that the Divisional Court was right to agree with the reasoning of the CAT that the giving of financial assistance is only included in the term claims management services if it is given by someone who is providing claims management services within the ordinary meaning of that term.
>
> 255. I would therefore dismiss the appeal."

The majority of the Supreme Court prevailed. The lead judgment does not refer to the dissenting judgment and the dissenting judgment does not refer to the lead judgment.

As to the solution? It might be possible to have an entirely new agreement with retrospective effect. Trying to amend a defective agreement would be fraught with difficulty.

The position where past agreements have been concluded and money paid to the litigation funder will be fact sensitive. Presumably, the parties, relying on the CAT or Court of Appeal, will have acted under a mutual mistake of fact (i.e. that the agreement was not a DBA). It is possible that one of the parties might seek to have their agreement declared void and yet others might make a claim for money had and received.

4 *R (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions* (No 8) [2003] QB 381

5 *Arkin v Borchard Lines Ltd* (Nos 2 and 3) [2005] 1 WLR 3055.

The ramifications of the decision are potentially very significant. Following the Supreme Court's judgement of 26 July 2023, the Department for Business and Trade has released the following statement on 31 August 2023:

> "The Department is aware of the Supreme Court decision in Paccar and is looking at all available options to bring clarity to all interested parties."

Diag v Volterra

Nicola Greaney KC
Call 1999 | Silk 2023

Christopher Moss
Call 2021

Factual Background

In February 2017 the Claimants had retained solicitors to act for them in an arbitration claim. The engagement letter provided for payment by reference to hourly rates. A few months later, a side letter, signed by the solicitors and the second claimant, stated that a new retainer had been created, incorporating the terms of the original engagement letter. It further stated that the fees payable should be subject to a discount of 30%, but that in consideration for that discount, in the event of an award or settlement of the arbitration claim the claimants would pay additional fees also set out in the side letter, effectively amounting to a success fee of over 100%.

By early 2019, although the claimants had paid over $1.5m USD to the solicitors they were in significant fees arrears, the solicitors terminated the retainer and put in a bill seeking the outstanding discounted fees.

It was common ground that the side letter was a conditional fee agreement (CFA) which did not comply with secondary legislation passed under the Courts and Legal Services Act 1990 s.58 and s.58A because there was a prospect of the success fee being more than 100% of the solicitors' base fees. The solicitors argued that the non-compliant parts of the side letter could be severed in order to save their entitlement to 70% of the fees. Alternatively, the solicitors argued that they were entitled to be paid on a quantum meruit basis. In any event, they argued that they were entitled to retain sums the client had already paid on account of costs. These points were addressed as preliminary issues in assessment of the bill.

At first instance Costs Judge Rowley held against the solicitors on each point. The consequence of the CFA being unenforceable was that the solicitors could recover nothing under their bill, which he assessed at nil, and that they were required to repay to their clients sums that the clients had paid on account; this decision was upheld by Foster J.

The Solicitors' arguments

It was common ground that stages 1 and 2 of the 3-stage test for severance were satisfied. Namely that removing the requested clauses would still leave a contract that made sense, and that there was adequate consideration for the remaining clauses. The parties disputed whether the 3rd stage – that severance would not fundamentally change the nature of the contract to render it something different to that which the parties had entered into – was satisfied. They also disputed whether it would be contrary to public policy for the solicitors to recover their fees if the provisions could be severed.

The solicitors argued that:

1) Severance would not fundamentally change the nature of the contract.
2) Public policy regarding the availability of severance in the case of otherwise unenforceable CFAs had moved on from decisions such as *Giles v Thompson* [1993] 3 All ER 321 and *Awward v Geraghty and Co* [2001]

QB 570 which set out the rationale behind the public policy prohibition on champertous agreements; and that it was open to the Court to hold that public policy no longer prevented the solicitors from being paid the discounted fees (which the clients had agreed to pay in all circumstances).

3) The decision in *Garnat Trading & Shipping (Singapore) Pte Ltd v Thomas Cooper* [2016] EWHC 18 (Ch), in which an unenforceable CFA relating to the costs of an appeal was successfully severed from the rest of the private paying retainer which dealt with the first instance costs, was indistinguishable from the current case and should be followed. Further, that *Garnat* demonstrated the shift in public policy towards severance.
4) The solicitors were entitled to fees assessed on a quantum meruit basis; and
5) On retention of payments on account, the decision of Garland J in *Aratra Potato Co Ltd v Taylor Johnson Garrett* [1995] 4 All ER 695 provided that, absent a restitutionary claim being brough by the Claimants, the solicitors were entitled to retain the payments already made.

The Court of Appeal

The Court of Appeal unanimously dismissed the appeal.

As a starting point, Stuart-Smith LJ noted that the agreement between the parties as a whole was a CFA and hence, the agreement as a whole was unenforceable because it was noncompliant. [6]

Severance

Stuart-Smith LJ said that what must be compared is the contract pre-severance and proposed post-severance. It was not logical to look only at the unchanged terms [37]. Although the greater the overlap, the more likely the conclusion may be that the nature of the contract has not changed [38]. It is a matter of substance, not form [40].

The proposed severance would fundamentally change the nature of the contract because pre-severance a substantial proportion of the proposed remuneration was conditional on the contingencies and post severance it became a conventional retainer for a discounted rate (not conditional) [40]. The fact that severance would remove the stated consideration for the reduced fees emphasised the difference in the nature of the contract [40].

Garnat was distinguishable (where the severed provisions related only to work done on the appeal – the original retainer applied to non-appeal related work after the date of the variation) because the retainer continued to apply. By contrast, the agreement between the parties as to all work would be converted from a CFA into a conventional retainer [45].

The solicitors sought to rely on Lewison LJ's narrow approach to what constitutes a DBA, in *Lexlaw Ltd v Zuberi (Bar Council Intervening)* [2021] 1 WLR 2729. This argument was rejected by Stuart-Smith LJ as not being open to them because of the terms of section 58(2)(a) which precluded splitting of the provisions for discounted payment as not being part of the CFA. He also said the provision for discounted fees was not analogous to the termination provision in *Zuberi*. He said, "the considerations of public policy which supported Lewinson LJ's narrow construction of the meaning of a DBA are absent in a case involving CFAs such as the present." [53]

Even if he was wrong about the 3rd test, Stuart-Smith LJ held that severance would be precluded on public policy grounds because it would permit partial enforcement of an unenforceable CFA. The effect of allowing severance was that the solicitors would recover precisely the same amount of fees as if the CFA had been held to be enforceable. That was not a tolerable outcome. [62]

Andrew LJ agreed with Stuart-Smith LJ: "..this was an attempt to carve out a special regulatory regime for discounted CFAs, with potentially far-reaching consequences…There would be little incentive for solicitors to adhere to the regulations if the worst that could happen is that the client has

to pay the amount the client agreed to pay win or lose. "It makes no difference to the principle if that amount is based on a discount from the solicitors' hourly rate, or subject to a financial cap." [81]

Garnat was additionally different because the basis of remuneration for first instance work remained the same pre and post severance; the solicitors would receive no remuneration for the services that they agreed to provide on terms that offended public policy. By contrast, the terms subject to the CFA in the instant case were for remuneration for all the services provided. [82]"

Quantum Meruit

Stuart-Smith LJ held that allowing the solicitors to recover on a quantum meruit basis would be contrary to both authority, in particular *Awwad v Geraghty & Co* [2001] QB 570, and public policy. [67]-69] Andrews LJ held: "it is not open to the solicitors to claim by the back door any payment for their services which they cannot receive through the front. There is authority of the highest level to that effect, including *Orakpo v Manson Investments Ltd* [1978] AC 95 and *Dimond v Lovell* [2002] 1 AC 384." [83]

Repayment of retained fees

The Court held that the detailed scheme of assessment for solicitor's bills under s70 of the solicitors Act 1974, CPR 47, PD 46, and PD 47 left no room for the Solicitors' argument that "sums paid on account by reference to an agreement that is held to be unenforceable shall only be repaid if the client justifies repayment on restitutionary principles." The bill had been assessed at nil and therefore no sums should have been paid to the solicitors at any stage pursuant to the agreement. The decision in *Aratra Potato* offered no assistance to the solicitors – it could not stand in light of later decisions and was also decided without reference to the statutory scheme for assessment. [72] – [80].

Andrews LJ additionally held that even if the Solicitors' argument was correct that the Claimants should have brought a claim in restitution, the Claimants would still have been entitled to a return of the payments on account: "I consider the solicitors would have no defence to a claim by the clients for the recovery of fees paid for services carried out under the unenforceable CFA. Garland J's tentative contrary conclusion in *Aratra Potato* is wrong, and has been overtaken by later and higher authorities, as confirmed by Stuart-Smith LJ in para 79 above."

Comment

That there would be significant financial consequences for the solicitors if their appeal were to be rejected was of little importance to the Courts' decision and provided no good reason for lessening the statutory requirements of a CFA. A clear takeaway is therefore the importance of ensuring that your funding agreement complies with relevant legislation.

This decision is likely to have significant further relevance given the Supreme Court's decision in PACCAR that most litigation funding agreements were damages-based agreements, a majority of which will be unenforceable as they were not drafted with the DBA regulations in mind. The question of whether severance can be used by funders to save their LFAs post-PACCAR remains outstanding but doubtless *Diag Human* will be cited by Defendants in support of adopting a restrictive approach. Litigation funders can, however, take some solace from Stuart-Smith LJ's recognition that different public policy considerations apply to DBAs [53], likewise the fact his analysis was rooted in the specific statutory scheme governing CFAs [20].

Lastly, the refusal to award any sums by way of quantum meruit is unsurprising given previous decisions' emphasis that unjust enrichment is not a panacea for an otherwise unenforceable agreement.[1] Similar reasoning to *Diag Volterra* was also adopted in respect of Counsel's fees for direct access work in *Glaser and Miller v Atay* [2023] EWHC 2539 (KB).

6 For example Keyser J in *Moorgate Capital (Corporate finance) Ltd v HIG European Capital Partners LLP* [2019] EWHC 1421 (Comm) at [88] "[it is] not the role of the law of unjust enrichment to create for the parties contracts that they never made."

Glaser v Atay [2023] EWHC 2539 (KB)

Daniel Kozelko
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Introduction

In this appeal Turner J considered whether the Consumer Rights Act 2015 prohibited two barristers from relying on payment terms in their direct access contracts with a client. The contractual terms used a form of the BSB's standard template, making this case significant for all practitioners undertaking direct access work.

Background

The underlying case concerned financial remedies proceedings between the Defendant and her husband. The Claimants were instructed as counsel to appear at a PTR on 10 July 2020, and a 10-day final hearing commencing on 21 September 2020. What was described as the 'payment term' read:

> *For the avoidance of doubt, the fee covers the above-mentioned work and therefore if the hearing concludes early or is adjourned to another date or does not go ahead for any reason beyond our control, then the full fee is still payable and another fee will be payable for any adjourned hearing.*

The payment schedule for senior counsel read:

> *Total amount due: £108,000.*
>
> *The first payment of £12,550 is due by 6 July 2020.*
>
> *The second payment of £12,550 is due by the 10 July 2020.*
>
> *The third payment of £79,200 is due by the 31 August 2020.*
>
> *The final payment of £3,700 and any other fees due in respect of additional work is due 28 days after receiving the final order.*
>
> *[…]*
>
> *Any additional work will be billed at my hourly rate of £500 plus VAT.*

Turner J did observe that this form of the BSB standard template envisaged attendance at a one-day hearing only, and that refreshers would only arise if the case lasted longer than a day not agreed in advance. It was conceded before him that the payment term providing for payment in advance was an addition to the BSB standard terms.

The Defendant paid the first two sums as they became due. However, on 26 August 2020 the final hearing was adjourned. The Defendant wrote to the Claimants on 31 August 2020 and informed them that she no longer wished to instruct them and would not pay any further fees. The Claimants brought proceedings to recover the remainder of their fees.

The dispute turned on the issues:

1) whether the payment term fell within the exclusion of assessment of fairness in s.64 CRA 2015;
2) if not, whether the term was unfair; and,
3) the effect of any unfairness found.

The Grey List

Turner J first considered the 'safe harbour' provisions in s.64 of the Act, and the 'grey list' of terms in Part 1 of Schedule 2. He noted that the payment term had to be analysed from the point in time at which the contract was entered into. This was key as, if the Defendant had informed the Claimants she would not pay at all before 6 July 2020, she would have been in anticipatory breach of contract. The Claimants could then have opted to terminate the contract and claim the full fee while performing no work.

Considered in this way, Turner J concluded that the payment term did not fall into the safe harbour provisions by virtue of para 5 of the grey list terms. Insofar as is relevant, that provision reads:

> *5 A term which has the … effect of requiring*

that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum…for services which have not been supplied.

Turner J rejected the submission that, because the sums were owed as debt, para 5 would not apply. The practical effect of a term such as the payment term is a 100% non-refundable deposit. To decide otherwise would leave clients open to unscrupulous barristers agreeing brief fees which are incurred and payable whether or not a matter has any prospect of proceeding to trial.[7]

Unfairness

Turner J then went on to consider the fairness of the payment term. Considering the BSB code guidance GC 107, he noted that the prohibition on barristers holding client money did not preclude an agreement for reimbursement of part of a fixed fee by reference to time actually spent working. As such, a direct access contract can be drafted without obligations on consumers to pay all fees up front with no prospect of recovery.

Having considered the case law, Turner J concluded that the term created a significant imbalance in the parties' rights and obligations, and thus the term was unfair. The risk on counsel, while not nothing (given the difficulty of finding work at short notice) was far below the massive financial risk for the consumer if the trial did not go ahead. Ultimately, the fee was an all or nothing term weighed 100% in favour of the Claimants.

Effect of Unfairness

Having found the term unfair, Turner J went on to note that the payment term was not binding on the Defendant. He also went on to hold that the removal of the payment term in full resulted in an exclusion of the possibility of recovery of fees through quantum meruit. This was because, once the payment term was removed, the contract became an entire obligation: a lump sum for preparation and appearance at trial. Having not agreed a divisible contract, and having not appeared at trial, the fee was not due and quantum meruit excluded. In any event, Turner J considered the operation of the CRA 2015 was to exclude reliance on quantum meruit; to do otherwise would remove the incentive on traders to include fair terms for payment.

As a result, Turner J allowed the appeal and dismissed the Claimants' claims.

Conclusion

As Turner J noted, a carefully thought-out document might have been more appropriate in the circumstances given the significant sums involved. Indeed, practitioners undertaking direct access work must be careful not to wave through direct access contracts, even if apparently on the BSB's standard terms.

When is a deputy liable personally for professional fees incurred on P's behalf?

Simon Edwards
Call 1978

This question arose in *Brassington v Knights Professional Services Ltd (t/a Knights) (Re Court of Protection – Deputyship)* [2023] EWHC 1568 (Ch), where HHJ Hodge KC (sitting as a Judge of the High Court) had to consider the question of whether a former employee of a solicitors' firm acting as a professional deputy could be personally liable for costs which had been recorded on her deputyship files whilst she was employed by that firm but which could not properly be billed to, or recovered from, the protected persons in relation to whom she had been appointed deputy.

The matter came before the court on an application for summary judgment within a Part 8 claim brought by the former employee

7 In any event, Turner J went on to conclude that the payment term would not have fallen within s.64.

(a solicitor) for a declaration she was not liable. Notwithstanding that it was an application for summary judgment and only lasted half a day, the court reserved judgment and delivered a full one answering the question with a resounding 'no'. The core reasoning is to be found at paragraph 78, at which HHJ Hodge KC stated that:

> *"in my judgment, by subscribing to her standard deputyship letter [an entirely standard form of letter expected where deputy is obtaining legal services], Mrs Brassington was, in each case, contracting with Knights solely in her capacity as deputy, and as agent, for and on behalf of P. That seems to me to be the clear meaning and effect of the language of the standard-form letter, construed in the statutory context against which both parties subscribed to it. Both parties understood that P, rather than Mrs Brassington, was Knights' true client, as evidenced by the way the client was identified and referenced in Knights' statements of account and, by inference, its files and other records. That conclusion accords with both the common sense, and the commercial reality, of the retainer, with Knights owing duties in contract, and not only in tort, to P, rather than to Mrs Brassington, who was the person charged with carrying out the work in relation to the deputyship, which was the relevant engagement. After all, the work Knights was being engaged to carried out was for the benefit of P, rather than Mrs Brassington personally. That conclusion also accords with the provisions of s. 19 (6) of the MCA, which treat the deputy as P's agent, and the explanation of its effect at para 8.55 of the Code of Practice. I agree with Mr Kelly that this explanation is only a short, and necessarily, incomplete, rather than a comprehensive statement of the law concerning the personal liability of an agent; and that the terms of any contract signed by the deputy, its nature, and the surrounding circumstances, all have to be scrutinised carefully to determine whether the deputy is thereby assuming any personal liability."*

As HHJ Hodge KC observed, he had raised the question of how the standard deputyship letter:

> *"might be capable of rendering her (and her family co-deputies) liable to Knights for unpaid WIP, representing sums by way of remuneration and expenses that have been disallowed by the SCCO, if (as both parties accept) P is not liable for such sums. I find it difficult to understand how the same words can bear different meanings, and produce different effects, for Mrs Brassington and for P. Counsel have supplied me with no satisfactory answer to this conundrum.*
>
> *83. Subject to any further argument that might be presented to the court on this aspect of the case, it seems to me that the position can only be reached whereby P is not liable under Mrs Brassington's standard deputyship letter for any remuneration and expenses that have been disallowed on assessment by the SCCO if the terms of that letter are subject to an overarching implied term to that effect. Such a term could only be implied on the grounds either of business efficacy, or of obviousness, on the basis that, without it, the deputy's engagement of Knights would lack all practical or commercial coherence. Even then, there is the obvious problem that a term cannot properly be implied which would contradict an express term of the contract. Such a term would have to be justified by reference to the peculiar position of a COP-appointed deputy, and the constraints imposed by the MCA and ancillary COP and SCCO practice and guidance. The difficulty I entertain about all of this, however, is that identical, or similar, considerations would seem to me to militate in favour of the implication of such a term into any contract of retainer whereby solicitors are engaged to act in connection with a COP deputyship, whether the counter-party is P, a professional deputy, or a family co-deputy, since the constraints operate in precisely the same manner in all such situations. Fortunately, these are matters that call for no final determination as part of this judgment."*

As the judge said, this accords with the fundamental point that a deputy acts as P's agent.

In standard agency law, the agent is not personally liable on a contract the agent enters into on their principal's behalf. This is subject to a number of exceptions (none of which applied in this case) such as where there is an undisclosed principal or where the agent expressly assumes liability with the principal (subject to any right of indemnity they may have against their principal).

The same principles will apply also to litigation friends who act as statutory agents for the protected party, see *B v B* [2010] EWHC 543 (Fam). If a solicitor, or other professional, wants to make a deputy (or litigation friend) personally liable on the retainer, then this will have to be clearly spelt out. Further, if the solicitor wants to be able to recover costs beyond those allowed on assessment by the SCCO, again, that would have to be very clearly set out and, in contentious cases, the provisions of and case law relating to CPR 46.9(3) (concerning informed consent) carefully borne in mind.

QOCS and Mixed Claims: A PI case *"in the round"* and exceptionality?

Samuel Burrett
Call 2013

In *Afriyie v Commissioner of Police for the City of London* [2023] EWHC 1974 (KB), Hill J had to determine whether the Defendant should be granted permission to enforce a costs order in a 'mixed claim' under CPR 44.16(2)(b).

The background

The Claimant brought claims for assault, battery and misfeasance in public office, which arose out of an incident in which he had been tasered by one of the Defendant's officers. Those claims were dismissed at trial. The Defendant's argument that the claims should have been dismissed, in any event, due to the Claimant's fundamental dishonesty was also rejected.

As to costs, the parties agreed that it was a 'mixed claim' for the purpose of QOCS, in that the proceedings involved both claims which were for damages for personal injuries and claims which were not. The key issue was, therefore, whether the Defendant should be granted permission to enforce an order that the Claimant pay its costs under CPR 44.16(2)(b).

The legal framework

Hill J set out the relevant legal principles in respect of 'mixed claims' as recently expounded in *ABC & Ors v Derbyshire County Council & Anor* [2023] EWHC 986 (KB) at [22]-[36]. In short, CPR 44.16(2)(b) provides that where there is a 'mixed claim':

> *"(2) 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…"*

As to how the discretion under CPR 44.16(2)(b) should be exercised, Coulson LJ held in *Brown v Commissioner of the Police of the Metropolis* [2019] EWCA Civ 1724 at [57] (recently endorsed in *Achille v Lawn Tennis Association Services Limited* [2023] I WLR 1371 at [37]):

> *"If…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 hire car claim, or something similar), I would expect the judge deciding the costs to endeavour to achieve a 'cost neutral' result through the exercise of the discretion…"*

The issues

While the central issue was whether it was *"just"* under CPR 44.16(2)(b) to grant permission to enforce the costs order, Hill J identified, from the approach in *Brown* at [57], two questions which needed to be answered to determine how the discretion should be exercised:

1. Could the proceedings fairly be described *"in the round"* as a personal injury case?
2. If so, are there any *"exceptional features"* of the non-personal injury claims?

A personal injury case "in the round"?
To answer that question, following *Brown*, Hill J said at [20] that *"it is more helpful to consider the types of damages…sought"* than the causes of action. She identified the five types of damages sought:

i) basic damages for assault and battery,
ii) general damages for personal injuries,
iii) special damages,
iv) aggravated damages, and
v) exemplary damages.

Hill J considered that the damages claimed under (ii) and (iii) were straightforwardly in respect of personal injuries and that the damages claimed under (i) were not. However, the latter would have only merited an award of £1,500 so represented a modest part of the Claimant's overall claim.

More complicated were the claims for aggravated and exemplary damages under (iv) and (v) which formed a substantial part of the claim's overall value. Hill J found that they *"did not relate to, nor require proof of, any personal injury"*, but were *"further heads of claim for punitive and compensatory damages respectively"*, applying *Jeffreys v Commissioner of the Police for Metropolis* [2017] EWHC 1505 (QB). However, she said at [28]:

> *"…the assault claim based on the act of tasering the Claimant was the most serious of his assault claims. In my judgment it was that act which was at the heart of the case, and the claims for aggravated and exemplary damages related largely to matters which made the Claimant's experience of being tasered worse and/or the actions of both parties in seeking to explain the tasering after the event. The act of tasering the Claimant was one that did cause him personal injuries and involved the use of potentially lethal force on him…"*

For all those reasons, she considered that the claim was, in the round, one for personal injuries.

Are there exceptional features of the non-personal injury claims?
On that basis, applying the approach in *Brown* at [57], Hill J went onto consider whether there were *"exceptional features of the non-personal injury claims"* which would merit disapplying QOCS protection and ordering something other than a *"cost neutral"* result under CPR 44.16(2)(b).

Counsel for the Defendant had not made submissions directed to that specific question. However, he had submitted that the following factors should be taken into account in the exercise of the general costs discretion under CPR 44.2:

1. The Claimant's rejection of three (non-Part 36) offers;
2. The Claimant's serious allegations of bad faith and corruption against the Defendant;
3. The Claimant's pursuit of a misfeasance claim which added nothing to the other claims;
4. The Defendant's success on all the issues;
5. The finding that the Claimant's conduct caused or contributed to the incident;
6. The significant similarities between the Claimant and his witnesses' statements;
7. The finding that the Claimant had been dishonest in relation to a breath test; and,
8. The interview the Claimant gave to the Guardian before the trial to pressure the Defendant.

In fairness to the Defendant, Hill J considered whether those factors amounted to *"exceptional features"*. With apparently little hesitation, she concluded that they did not. Even if they were exceptional, she found that they did not relate exclusively to the non-personal injury claims but applied to the personal injury claims as well.

Accordingly, she refused to grant the Defendant permission to enforce the costs order.

Comment
This is another helpful case to add to the library

on how to approach 'mixed-claims'. It makes yet clearer that the question of whether a case is *"in the round"* a personal injury one is determined by the type of damages sought and not the cause(s) of action. Further, where a case is, in the round, one for personal injuries, it provides a useful checklist of factors which are unlikely to amount to *"exceptional features"* for the purpose of disapplying QOCS, albeit the determination of whether they do or not will be case-specific.

R(City Portfolio Ltd) v Lancaster City Council [2023] EWHC 1991 (Admin)

Christopher Moss
Call 2021

Introduction

In this case, Mr Justice Fordham had to determine the Claimant's application for costs following the withdrawal of their judicial review claim. Whilst the Defendant local authority had chosen to determine the judicial review claimant's grievance, albeit rejecting it, the question for the Court was whether the Defendant should be liable for costs, and if so, to what extent.

Facts

The Claimant owned land at Stone Row Head in respect of which it had applied for planning permission in November 2020. On 7 January 2022 the Defendant designated the Lancaster Moor Conservation Area based on an emergency report dated 6 January 2022, without undertaking a consultation before doing so. The catalyst for urgent action was said to be an application dated 13 December 2021 for demolition of the old hospital at Ridge Lea. The designated Conservation Area included within it the hospital at Ridge Lea and the land at Stone Row Head. After a letter before claim (9 January 2022), the Claimant began judicial review proceedings (17 February 2022). Permission for judicial review was granted on all 6 of the pleaded grounds (4 April 2022).

In August 2022, the Defendant carried out a public consultation on the merits of continued designation of the Conservation Area. On 19 October 2022 the Claimant responded to the consultation. On 6 December 2022, post-consultation, the Defendant decided to rescind the 7 January 2022 designation and adopted a varied Conservation Area. The varied area still included the hospital at Ridge Lea and the land at Stone Row Head. Following the December decision, the parties filed an agreed statement that as the decision under challenge had been withdrawn, the claim for judicial review was now academic. The only remaining dispute between the parties was whether the Defendant was liable for the Claimant's costs of the withdrawn judicial review, totalling £83,294.16 and if so, to what extent.

The Claimant's essential argument was that it should be entitled to its costs as it had achieved the intended outcome of the judicial review proceedings: there was a public consultation and the designation came to be withdrawn, both outcomes which had been causally connected to the claim. The Defendant's argument was that the August consultation and December decision were free-standing. They maintained the January decision was lawful and the Claimant had not obtained vindication in respect of a challenge to this. The process of further consideration was motivated solely by the fact that the urgency surrounding the (entirely lawful) January 2022 decision had not allowed for consultation, it had nothing to do with the Claimant's claim.

Judgment

Mr Justice Fordham considered two key questions, whether:

1) The Claimant could be considered the successful party; and, if so
2) Whether the Claimant's 'success' was casually linked to their bringing of the claim.

In respect of the first question, the overarching principle is that a Claimant who obtains all the relief they seek is the successful party and they will be entitled to all of their costs unless there

is a good reason to the contrary [8]. In judicial review, often the most that can be achieved by way of 'success' is an order that a decision-maker reconsiders their decision on a correct legal basis. [9]-[10]

In respect of the second issue, the question is whether there was a causal link between the bringing of the claim and the obtaining of relief. If a Defendant claims to have settled a claim for reasons unconnected to the Claimant's claim, a clear explanation of this is needed, and if a Defendant wishes to avoid costs when making a concession, this should in principle be done at the pre-action stage. Whilst it had been said that establishing the causal link will usually mean the court has to be satisfied the Claimant is likely to have won, this is not always the case and there is no principle that the Claimant must achieve vindication on the legal issue which is the basis of the claim in order to obtain an order for costs. Claimant's costs orders in judicial review cases may be broadly appropriate where the outcome sought in the claim is achieved. [11-13]

On the facts of this case, Mr Justice Fordham agreed with the Defendant that its December 2022 decision did not vindicate the Claimant's claim, the legality issues remained unresolved. However, the Judge considered that the Claimant was right that the December 2022 merits reconsideration following the August 2022 consultation was all that could have been achieved by way of the 'outcome' of the judicial review, and in this sense the Claimant had 'succeeded'.

Mr Justice Fordham held that he could not accept the Defendant's submission that the reconsideration was motivated solely by the fact the urgency in January 2022 was no longer present as the Defendant had provided no evidence in support of this and authorities set out that a clear explanation of a Defendant's decision was required, and that close scrutiny would be appropriate. Against the "dearth of evidence… there is common sense…. I cannot accept the submission that this decision was "nothing to do with" the claim". [17].

The question of what costs the Claimant was entitled to was fact specific. Mr Justice Fordham held that the Defendant could have avoided a costs order entirely had it identified public consideration and merits reconsideration as a response to the Claim for judicial review. However, he also noted it was open to the Claimant in its letter before claim of 9 January 2022 to identify these as options the Defendant could adopt and they failed to do so. When proceedings were commenced on 17 February 2022, the Defendant had the opportunity to reflect again when filing its acknowledgment of service on 11 March 2022. He held that if the Defendant had identified consultation and a merits reconsideration at this stage, they would not have merited costs penalisation. However, again they did not do so. The Defendant's reconsideration came only after permission was granted on 4 April 2022.

On the facts and circumstances of the case, Mr Justice Fordham held that the order that would do justice between the parties reasonably and proportionately was for the Defendant to pay the Claimant's costs of the judicial review proceedings incurred after 11 March 2022, on the standard basis, to be the subject of a detailed assessment if not agreed.

Comment

Whilst City Portfolio is another example of the highly fact specific nature of many costs decisions, it also offers a number of useful takeaways for practitioners on both sides of a claim.

1) Mr Justice Fordham's decision is a concise and helpful consideration of what 'success' means for costs purposes in the judicial review context and paragraphs [7]-[13] of his Judgment provide an overview of the relevant case law that will doubtless provide particularly helpful for practitioners;
2) When advising on a claim, consider what success looks like for your client in practical terms at the earliest possible stage. As Mr

Justice Fordham notes, where the relief sought is a finding that the decision under question was unlawful, the best that can usually be achieved by way of judicial review is getting the relevant public body to 'look again'. Inviting the Defendant to do so at pre-action stage will therefore usually be a sensible idea. Here, given the Judge noted that the Claimant failed to make this clear in their letter before claim despite it being open to them to do so, it may well be the case that flagging this option at the pre-action stage would have resulted in a more favourable costs order; and

3) As a Defendant, if you are seeking to argue that there was no causal link between the Claimant's claim and a decision that either renders the claim academic or amounts to 'success' for the Claimants, this decision makes abundantly clear that cogent and candid disclosure of evidence of fact to support such a position is essential.

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Call 1999 | 2023

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* 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. She is available to give advice and representation in a variety of costs cases and lectures regularly on costs issues. *"She has a very good manner with clients."* The Legal 500.

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

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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 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 regularly 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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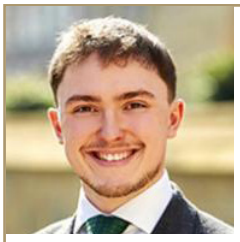

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Christopher is keen to grow his practice in planning and environmental matters. He has advised claimants and local authorities on matters including rights of way and related issues, breach of condition enforcement proceedings, and local authorities' powers in relation to restricting advertising of 'high carbon' products. He is currently being led by Daniel Stedman Jones in a judicial review of a decision by a local authority to de-pedestrianise a road as part of a multi-million-pound scheme of highway improvements.

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- 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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