Essex CHAMBERS

3+9=Costs

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Introduction

Shaman Kapoor
Call 1999

EDITOR

Welcome to the 9th Edition of 3 + 9 = Costs.

The Costs and Litigation Funding sector remains as buoyant and busy as ever. Our team has been busy with editorial work for the Litigation Funding Supplement to the White Book (released April 2024), attending at the Brown Rudnick Litigation Funding Conference, speaking at the White Paper conference in London, attending at the Association of Costs Lawyers in Manchester, whilst maintaining busy practices, and we are only in April! More to come on the horizon and we look forward to seeing you very soon. Look out for our team at the Costs Law Reports Conference, London in September.

In the meantime, picking off our favourites of the last six months, there seems to be a theme of beneficiaries and litigation funding. Pivoting that seesaw, we bring you some practical guidance in a brain injury case.

First a visit to the Supreme Court, where judgment is awaited, in the case of ***Hirachand v Hirachand & Anr***, in which case the Supreme Court is considering whether a success fee in a CFA is a 'debt' amounting to 'financial need' for the purposes of the Inheritance (Provision for Family Dependants) Act 1975, such that the Court can go on to consider whether to permit an award out of the deceased's estate, upon an application by a dependant.

Second, we review a decision of the Court of Appeal in ***Kenig v Thomson Snell & Passmore.*** Here, the Court of Appeal reviewed the operation of s.71(3) of the Solicitors Act 1974 as it applies to beneficiaries under a will who seek assessment of solicitors' costs even where those costs have been approved by the executor and paid by the estate. Section 71(3) operates differently from section

71(1), and so we are likely to see more challenges in this context.

Third, the pivot, we turn to ***Hadley v Przybylo***, in which the Court of Appeal grappled with its expectations pertaining to costs budgets which claimed for fee earner time to attend rehabilitation case management meetings in a serious brain injury case involving a protected party.

On the other side of the seesaw, we focus on the theme of litigation funding and review a decision of the High Court in ***Jalla v Shell International.*** In this case, a law firm found itself the subject of non-party costs order application brought on the grounds that it had in fact become the real party to the litigation when it was, at the first stage, unable to demonstrate evidence of funding arrangements and authority to act on behalf of more than 27,000 claimants.

Sticking with the theme, we next turn to provide an update on the **latest news regarding draft legislation** to tidy up the PACCAR problem. Retrospective effect is anticipated, and hopes are that the Bill will get approval before Parliament's summer recess. The litigation funding industry will be reassured by the fast progress as will we all in relation to protecting access to justice.

Finally, to round up this newsletter, we review the High Court judgment in ***Therium Litigation Funding AIC v Bugsby Property LLC.*** The case explores the current position post-PACCAR in the context of an application for injunctive relief for preservation of assets (settlement sum) brought by a funder and others against the claimants and its new solicitors. It shines a light on the possible mechanisms at play that might get around PACCAR and the way in which legal argument may be deployed to avoid those consequences.

Interesting stuff, I'm sure you'll agree!

Contents

Hirachand (Appellant) v Hirachand and Another (Respondent) UKSC 2022/0015

Simon Browne KC
Call 1982 | Silk 2011

Is a Success Fee agreed in a Conditional Fee Agreement in proceedings under the Inheritance (Provision for Family and Dependants) Act 1975, a debt the satisfaction of which may constitute a "financial need" for which the court may make provision in an award under the 1975 Act?

Issues

This appeal concerns the Inheritance (Provision for Family and Dependants) Act 1975 (the "1975 Act"), which gives the courts the power to order a lump or recurring sum to be paid out of the estate of a deceased person for his or her family and dependants. Section 3(1)(a) of the 1975 Act provides that, in determining whether and in what manner the court should exercise such a power, it shall have regard to "the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future" (among other matters).

The question for the UK Supreme Court is: was the Court of Appeal wrong in law to decide that a conditional fee agreement ("CFA") success fee is a debt the satisfaction of which may constitute a "financial need" for which the court may make provision in an award under the 1975 Act?

Oral submissions were heard for a full day on 18th January 2024. Their Lordship's speeches are awaited. This article reviews the competing arguments.

Background Facts

The appellant was the widow of Navinchandra Hirachand (the "Deceased"), who died in August 2016. The respondent was the daughter of the Deceased. In his will, the Deceased left the whole of his estate to the appellant. In November 2017, the respondent brought a claim under the 1975 Act for reasonable financial provision from the Deceased's estate. The judge at first instance awarded the respondent a lump sum calculated by reference to her "financial needs" within the meaning of section 3(1)(a) of the 1975 Act, including an amount referable to the respondent's liability to pay a CFA success fee (25% thereof was allowed). Under section 58A (6) of the Courts and Legal Services Act 1990, the respondent would not have been entitled to recoup the success fee by way of a costs order made in her favour. The appellant appealed this aspect of the judge's decision to the Court of Appeal.

The Court of Appeal Decision [2021] EWCA Civ 1498

The Court of Appeal upheld the judge's award and concluded that the respondent's liability for the CFA success fee was a debt, the satisfaction of which was a "financial need" within the meaning of section 3(1)(a) of the 1975 Act, for which the court might in its discretion make provision in an award under the 1975 Act.

It was held that a success fee arising under a conditional fee agreement, which pursuant to section 58A(6) of the Courts and Legal Services Act 1990 could not be recovered by way of a costs order, was capable of being a debt, the satisfaction of which was in whole or part a financial need within the meaning of section 3(1)(a) of the Inheritance (Provision for Family and Dependants) Act 1975, and for which the court might in its discretion make provision in an award under the 1975 Act.

Nevertheless, there were various caveats. It was unlikely that the court would do so unless satisfied that the claimant would not have been able to litigate the proceedings without having entered into a conditional fee agreement and consideration would no doubt have to be given to the extent to which the claimant had succeeded in their claim. Furthermore, an order would only be made to the extent necessary to ensure reasonable provision was made, although that did not mean that there could be no impact whatsoever upon the standard

of living that the claimant would otherwise be afforded by the award.

The Court of Appeal held that the judge in the present case (Cohen J.) had been right to conclude that an order under the 1975 Act could contain a sum referable to the claimant's liability to pay a success fee under a conditional fee agreement. On the facts, the judge had been entitled to conclude that the liability for the success fee was a debt capable of inclusion in the award under the 1975 Act and in awarding a modest contribution towards payment of the success fee the judge had had proper regard to the potential for tension with the wider civil litigation costs regime and had sought to mitigate the risk of injustice arising therefrom; and that, accordingly, there was no basis upon which to interfere with the judges award.

The Court of Appeal referred, as did the first instance Judge, to only two prior cases where this matter had been determined in lower courts – each resulting in a different result. *Clarke v Allen* [2019] EWHC 1193 (Ch), a decision of Deputy Master Linwood sitting in the Chancery Division in an Inheritance Act case where he declined to include the success fee in the award, and *Bullock v Denton* [2020] Lexis Citation 191, an unreported decision of HH Judge Gosnell in which he made such provision.

Cohen J. preferred the approach of Judge Gosnell (who himself relied upon dicta of Briggs J *Lilleyman v Lilleyman* [2013] Ch 225 on a different test). Indeed, the Judge found little difficulty with the success fee being a debt which could be included in the award. The Court of Appeal upheld this view stating:

> *"… a success fee, which cannot be recovered by way of a costs order by virtue of section 58A(6) CLSA 1990, is equally capable of being a debt, the satisfaction of which is in whole or part a financial need for which the court may in its discretion make provision in its needs based calculation.*

One matter which troubled Cohen J. was a concern with regard to the fact it was a contingency which may or may not arise in any cost's decision. He stated:

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

The Court of Appeal did not really delve into the precision of costs law, costs orders, success etc. It acknowledged that the Judge was alive to issues and commented that he could not avoid some potential injustice to one side or the other. The judge therefore mitigated that potential injustice by taking a cautious approach towards the success fee liability and made an order which resulted in only a modest contribution of 25% towards payment of the success fee.

From a costs perspective this was not the most erudite of judgments arising from the Court of Appeal which both confirmed and resulted in a "well let's give her a bit but not too much" approach. The Appellant now appeals to the UK Supreme Court.

The Supreme Court Hearing (Video feed https://www.supremecourt.uk/cases/uksc-2022-0015.html)

In the writer's opinion the various costs issues were well canvassed in the Supreme Court. There were clear concerns as to the tension between the legislative costs' regime generally and the award of success fee debt in 1975 Act proceedings. Apart from the interpretation of the statute and rules there were practical measures to consider.

In summary, the making of such an award would be contrary to legislative policy and put a CFA claimant in a better position in terms of negotiation, due to the risk of a substantial costs burden, and in a better position than a claimant in a personal injuries claim. It was well canvassed that to have different rules for 1975 Act claimants would put those funded by a CFA in a strong negotiating position.

The Appellant attacked the two primary decisions of the Court of Appeal. First, she challenged the finding that a court could make a maintenance-based order in that it provides for the payment of a success fee because it is not a "reasonable financial provision" that the deceased has failed to provide for. Secondly, there was strong reliance relied on the legislation under Section 58A (6) of the 1990 Act which provided a statutory prohibition that prevents any order that deals with costs seeking to recover, by way of payment by one party to another, a success fee under a CFA. It was emphasised that the costs provisions of 1975 Act proceedings were governed by the CPR and should not be undermined by a success fee being part of an award.

The Respondent took these submission head on and rejected that any statutory interpretation did not allow for a success fee to be governed by the CPR. Further, this was a matter well in the purview of the Court of Appeal (see *Simmons v Castle* and uplifts in general damages). In effect, the Court of Appeal was correct in upholding a wide discretion of the Judge as throughout the family / matrimonial legislation "in all of the circumstances" was the touchstone and that "costs of litigation could be part of the award as this area was wholly different".

Conclusion

The author does not have a crystal ball. To those who regularly practise in costs law the idea of a success fee being an award within an order prior to any determination of the case and costs being argued is an anathema. It does not sit comfortably with the rules and practice in other fields of law.

Nevertheless, matters dealt with under the 1975 Act do not always reflect regular litigation. If the appeal is upheld there may be consequences in favour of litigants on a CFA with a success fee, and converse disadvantages to those defending such claims. This was undoubtedly why the Court of Appeal agreed with the first instance Judge as to a number of caveats being applied to the making of such an award.

Some may view the Court of Appeal decision as a bit of a fudge. Well, for those old enough to remember, "a finger of fudge is just enough to give the claimant a treat" (apologies to Cadbury).

Assessments under s71(3) of the Solicitors Act 1974 – *Kenig v Thomson Snell & Passmore* [2024] EWCA Civ 15

Daniel Laking
Call 2015

This recent judgment from the Court of Appeal clarifies the operation of section 71(3) of the Solicitors Act 1974. It opens the door to beneficiaries under a will seeking assessment of solicitors' costs even where those costs have been approved by the executor and paid by the estate.

Facts

Mr Kenig and his sister were the beneficiaries of a will made by their mother, Mrs Cunnick. Thomson, Snell & Passmore (TSP) had been instructed by the sole executor to administer Mrs Cunnick's estate and charged £54,410.99 plus VAT for doing so. TSP transferred sums from the estate to meet their claims for costs. Mr Kenig wished to challenge the fees charged by TSP and applied to the Court for an assessment under section 71(3) of the Solicitors Act 1974.

Section 71

Section 71 makes provision for assessment of a bill on the application of third parties (in other words any person other than the client or the

solicitor). As the beneficiary of the will but not the executor, Mr Kenig was not a "party chargeable with the bill" and therefore could not make a "normal" application for the bill to be assessed under section 70.

The relevant parts of section 71 read as follows:

> *(1) Where a person other than the party chargeable with the bill for the purposes of section 70 has paid, or is or was liable to pay, a bill either to the solicitor or to the party chargeable with the bill, that person, or his executors, administrators or assignees may apply to the High Court for an order for the assessment of the bill as if he were the party chargeable with it, and the court may make the same order (if any) as it might have made if the application had been made by the party chargeable with the bill.*
>
> *...*
>
> *(3) Where a trustee, executor or administrator has become liable to pay a bill of a solicitor, then, on the application of any person interested in any property out of which the trustee, executor or administrator has paid, or is entitled to pay the bill, the court may order –*
>
> *a) that the bill be assessed on such terms, if any, as it thinks fit; and*
>
> *b) that such payments, in respect of the amount found to be due to or by the solicitor and in respect of the costs of the assessment, be made to or by the applicant, to or by the solicitor, or to or by the executor, administrator or trustee, as it thinks fit.*

Stuart-Smith LJ, giving the judgment of the Court of Appeal, noted that there would be different considerations applied to applications by beneficiaries under s71(3) compared with applications by third parties under s71(1) and case law dealing with the latter would not necessarily apply to the former.

Solicitors' Argument

TSP argued that the court was bound by the decision in *Tim Martin*[1] which set out a rule that, where the party chargeable had approved the bills, a third party under s71 could not challenge the reasonableness of the fees therein. This reflected a principle that the third party could only make challenges which would have been open to the client themselves. Once the client had approved the bill it was not open for a third party to bring a further challenge. *Tim Martin* concerned an application under section 71(1) but the judgment made no distinction between ss71(1) or (3). TSP therefore contended that, as the executor had approved its fees, Mr Kenig was precluded by operation of the rule in Tim Martin from bringing a further challenge to the sums in the bill.

Decision

However, the Court of Appeal found that Tim Martin only applied to s71(1) and the rule did not apply to the category of beneficiaries who could bring challenges under s71(3). Any comments about s71(3) in *Tim Martin* were obiter. In particular, a beneficiary making an application under s71(3) had a different interest in the proceedings compared with a third party under s71(1). Moreover, s71(1) restricted the Court to making the same order "as it might have made if the application had been made by the party chargeable with the bill." In contrast, that restriction did not appear anywhere in the wording of s71(3).

Comment

Clearly this finding opens the doors to beneficiaries seeking assessment of solicitors' costs under section 71(3) even where the executor has approved the sums sought. That position seems logical: the executor does not ultimately have a direct financial interest in fees which will be paid out of the estate. The judgment puts the power in the hands of the beneficiaries who do have such a financial interest. Solicitors should be aware that their fees for administering estates are likely to come under scrutiny by costs judges in future.

1 *Tim Martin Interiors Limited v Akin Gump LLP* [2011] EWCA Civ 1574.

However, solicitors should not despair entirely. The Court of Appeal made the point that approval by the executor "is likely to be a major consideration, which in many cases may prove to be determinative" in considering whether an assessment should be ordered. So there is scope to argue that, in individual cases, the approval of the executor renders an assessment unnecessary. But there is no hard-and-fast rule like that set out in *Tim Martin*.

Are the costs of lawyers attending case management meetings recoverable?

Bernard Doherty
Call 1990

In *Hadley v Przybylo* [2024] EWCA Civ 250, the Court of Appeal considered the following question: "is the cost of a fee earner's attendance at rehabilitation case management meetings irrecoverable in law as costs in the litigation?" [3].

Hadley was a serious brain injury claim arising from a road traffic accident and C was a protected party. C had been in hospital and rehabilitation facilities (gradually less intensive) for over 2 years after the accident. Thereafter, C continued to receive care and therapies subject to supervision by a case manager. By the time of the Court of Appeal hearing, the case had settled subject to court approval for a PPO of £170,000 pa for care and case management plus a lump sum of £5.6m. The care envisaged in the settlement was 24 hours per day including sleeping night care. Costs remained outstanding so the appeal was not academic.

C's costs budget included estimated costs of £68,400 for C's solicitor to attend the regular case management meetings with medical and other professionals, meetings concerned with C's medical and rehabilitation needs. Total costs including incurred under this head were over £130,000.

At first instance, Master McCloud held such costs did not progress the litigation and so were irrecoverable in principle. The Master acknowledged that there could be recoverable costs liaising with case manager or carer (obtaining documents for disclosure or information for a witness statement, for example) but concluded that attendance at meetings with a clinical purpose were in a different category.

The Court of Appeal allowed C's appeal against the decision of principle. The grounds were essentially as follows:

- Section 51 of the Senior Courts Act 1981 allows a party to recover "costs of and incidental to the proceedings" and confers a broad discretion [47].
- The broad limits of recoverability are as stated in *In re Gibson's Settlement Trusts* [1981] Ch 179. The costs must relate to something which (i) proved of use and service in the action, (ii) was relevant to an issue, and (iii) was attributed to the defendant's conduct (i.e. the tort): [38] and [47].
- The Master's test (whether work was "progressive" of the litigation or "non-progressive") was not helpful and might exclude some costs which fall within the statutory words "incidental to the proceedings" [50].
- Whether a claimed item of costs is recoverable will always depend on all the circumstances so it is unusual and unwise to try to set universal guidelines [47].
- D accepted that in principle "the role of a legal representative litigating a personal injury claim can be said reasonably to include costs for the purposes of furthering the claimant's rehabilitation needs" [53]. This accorded with the approach in the *Serious Injury Guide* and in the *Rehabilitation Code*. Rehabilitation was for the benefit of C but also of D (in optimising the outcome and therefore potentially reducing future losses and expenses.) So C's solicitor in engaging

with the clinical case management meetings or multi-disciplinary team meetings was not necessarily outside the scope of "costs of and incidental to the proceedings" [56-58].

- The Court of Appeal also held that where such costs are claimed, "Issues and Statements of Case" is the correct phase in which to identify them: [25].

So far so good for C. But the Court of Appeal was keen to stress that it would be wrong for a claimant's solicitor to assume that "routine attendance at such meetings will always be recoverable. It will always depend on the facts" [47]. The costs claimed in the instant case "seem very high" [60] observed the court and were "plainly open to challenge" [61]. The Court of Appeal certainly did not give carte blanche to solicitors to attend such meetings as a matter of course.

As the Court of Appeal eschewed general guidance, we do not seek to give such here. Some points do appear, however. There was acceptance by C that attendance in the earlier stages when the scope and nature of the rehabilitation is being fixed will be easier to justify than attendance later on when the machine has already been set in motion [60]. Recovery of costs will be far from automatic, so the solicitor will have to ask whether attendance at any given meeting will prove of real use and service in ensuring that an appropriate rehabilitation regime is put in place or enabled to continue. The use may lie in ensuring enough case management and rehabilitation but equally in avoiding excessive input, since that may lead to C failing to recover past expenses in full as in *Loughlin v Singh* [2013] EWHC 1641(QB).

Jalla v Shell International – Rosenblatt Limited face potential wasted costs order

Christopher Moss
Call 2021

In *Jalla v Shell International* [2024] EWHC 578 (TCC), Mrs Justice O'Farrell ordered Rosenblatt Limited ("RBL") to show cause why a wasted costs order should not be made in respect of their failure to demonstrate that they had authority to act for more than 27,000 claimants in proceedings arising from damages claims following a 2011 oil spill off the Nigerian coast.[2] A disclosure order was also made requiring RBL to provide documents evidencing the funding arrangements for the proceedings in support of a potential application for non-party costs order against them by the Defendants on the basis that RBL may have 'crossed the line' so as to become a real party to the litigation.

Background

The underlying claim arose from an oil spill off the Nigerian coast on 20 December 2011 caused by a ruptured pipeline operated and controlled by Shell. The Claimant landowners issued proceedings (Jalla 1) and protective proceedings (Jalla 2) against Shell and a number of other defendants. The Claimants purported to act on their own behalf and/or in a representative capacity for 27,830 claimants and communities in the Niger Delta. In 2023 the Supreme Court held that the underlying claim was limitation barred on the basis that the unremedied oil spillage to land from the rupture cold not constitute a continuing nuisance, accordingly limitation ran from December 2011 and the Claims, which were initially issued in December 2017 but amended in 2018 to sue Shell Limited in the UK, were out of time.

2 *Jalla v Shell International Trading and Shipping Co Ltd* [2023] EWHC 424 (TCC)

The Claimants were initially represented by another law firm, Johnson and Steller ("J&S"), who had purportedly obtained signed letters of authority from each of the >27,000 claimants, although disputed by the Defendants, but the point was never resolved. A steering committee was appointed with delegated authority to provide instructions. The claim was funded under a DBA. RBL initially became involved in November 2018 pursuant to a collaboration agreement with J&S for RBL to provide £2.3m of legal services and £2m in financial assistance. J&S were to pay RBL £1m within 30 days of the agreement and in the event the claim was successful J&S would pay the remaining £1.3m for legal services, repay the £2m of financial assistance along with 40% of the DBA payment received. In July 2020 J&S ceased to trade and in August 2020 RBL filed a notice of acting.

RBL entered into a DBA with the lead claimants, Mr Jalla and Mr Chujor, and the members of the steering committee. A dispute arose as to whether RBL had authority, as a matter of Nigerian law, to act for the remaining ~27,000 individual claimants. In February 2023, O'Farrell J. held that under Nigerian law RBL only had authority to act for the 5 individuals who had entered into the new DBA and for community claims in respect of community land rights which under Nigerian Customary law, Rulers and Kings could bring without obtaining the consent of their constituents. The Claimants had not established a customary law whereby the rulers or Kings could give authority to RBL to commence or pursue legal proceedings in respect of the private law rights of individuals without their consent. The costs of the authority argument were adjourned to be considered at the instant hearing.

Arguments

The Defendants made two applications seeking:

- Their costs of and occasioned by the authority issue; and
- Disclosure of funding documents.

The Defendants argued that they had been prevailed substantially in respect of the authority issue and were entitled to their costs, in written and oral submissions it was also argued that RBL should pay these costs either because they were the true party in respect of the issue or because a wasted costs order should be made against RBL for acting in breach of warranty. It being trite law that solicitors who issue proceedings warrant that they have authority to do so.

In respect of disclosure, the Defendants argued that disclosure of funding documents was justified to support a contemplated non-party costs order against RBL. The Defendants had incurred more than £14m in costs and the Claimants had failed to pay any of the £6,262,449.02 they had been ordered to make by way of interim payments. The Defendants submitted that it would be extremely difficult to enforce costs orders against the claimants, no ATE insurance was in place, and the Defendants had a reasonable belief that RBL and potentially other funding entities had 'crossed the line' through their funding and conduct of the litigation so as to become a real party to the litigation and to warrant making an order for costs against them pursuant to s51 of the Senior Courts Act 1981.

RBL opposed both applications. They sought a proportional costs order in respect of the authority issue to reflect their success. They opposed disclosure, disputing that s51 would provide the court with jurisdiction to make an order for costs against solicitors such as RBL where they were acting in claims pursued pursuant to lawful DBA arrangements, regardless of whether or not RBL had to secure funding to do so.

Judgment

Costs

O'Farrell J held that although the Claimants had some modest success, the Defendants had overall prevailed and ordered the Claimants to pay 90% of the Defendants' costs on this issue [57]-[62]. On the issue of wasted costs the Judge held that there was evidence before the Court which, if unanswered, would likely lead to a wasted costs order being made. This included RBL not having

authority to act on behalf of the vast majority of claimants, and they accepted that a solicitor acting without authority was vulnerable to wasted costs order. It is an abuse of process for solicitors to issue proceedings in breach of warranty. It was suggested by RBL that they had obtained letters of authority from 21-24,000 claimants, these had not been disclosed to the Defendants or the Court. It was arguable that RBL had acted improperly, unreasonably, or negligently in failing to notify the Defendants of this fact or produce them, particularly given disclosure may have avoided the authority issue arising. [72]-[76]. Accordingly, JBL were ordered to show cause why a wasted costs order should not be made against them.

Disclosure

It was noted that the mere fact a legal representative provides funding and has a substantial interest in the success of litigation will not necessarily expose them to costs under s51 SCA 1981. Each case must be considered on its facts to determine whether the legal representative has 'crossed the line' through its conduct of proceedings, including funding, to become a real party to the litigation. [91]-[92].

Here, disclosure was appropriate to aid in resolving this issue:

1) The issues raised by the Defendants "namely, RBL's control of the litigation, potential benefit from the litigation, the absence of authority from individual claimants, the lack of ATE insurance and involvement of third-party investors" were not fanciful. The merits were not a matter for the court at this stage.
2) The disclosure sought was likely to assist the court in determining whether s51 was engaged.
3) Where a DBA or similar funding model is utilised and a successful party is unable to recover costs form those benefiting from it, it is unsurprising that the successful party will wish to understand the terms of the funding when assessing its options. Further issues of privilege could be considered in due course.
4) Given the very high level of costs in proceedings, the relatively modest disclosure sought was proportionate and just in the circumstances.

   [97]-[101]

Comment

This is of course not the end of the line for the *Jalla* litigation and it is important to await the outcome of any further hearing once RBL have shown cause and provided the ordered disclosure. O'Farrell J's judgment does make clear that it is not fanciful for the Defendants to suggest that RBL may have flown too close to the fire with their involvement in the substantial litigation.

This judgment, along with O'Farrell J's earlier 2023 decision, is a cautionary tale on the importance of ensuring that firms have sufficient client authority to pursue a case on their behalf. There are, of course, practical difficulties in a claim of this size, particularly where the claimants resided in a remote part of Southern Nigeria. Nevertheless, these difficulties can be overcome, and indeed must be to avoid acting without authority. RBL had attempted to do so through operatives working in the region to obtain signed letters of authority from individual claimants. This exercise seems to have been somewhat fraught with a number of letters being defective [24] as of May 2021, and although allegedly ~21-24,000 letters had been obtained by September 2023 these had not been provided to the Defendant or the Court [44]. If RBL had indeed obtained, and thereafter disclosed, the >20,000 letters the authority issue may have become academic and the significant costs of the issue avoided.

Lastly, with the potential of non-party costs order being sought against RBL, in part because of the lack of ATE insurance, the decision also demonstrates the importance of ensuring that adequate costs protection is in place. O'Farrell J's judgment does not address the reasons why ATE insurance was not obtained but it seems likely that

if this had been in place, RBL may have avoided the risk of a non-party costs order being sought against them. Whilst obtaining ATE insurance in a claim of this size will no doubt be difficult and costly to each claimant, the likely cost to each claimant pales in comparison to the ~£14m of costs incurred by the Defendants in defending the claims, which they have indicated they may seek from RBL.

Litigation Funding Agreements (Enforceability) Bill

Nyasha Weinberg
Call 2020

The Litigation Funding Agreements (Enforceability) Bill (the **"LFA Bill"**) is currently going through parliament. The LFA Bill addresses the implications of the UK Supreme Court judgment in *R (on the application of PACCAR Inc & Ors) v Competition Appeal Tribunal & Ors* [2023] UKSC 28 which was handed down in July 2023 ("PACCAR").

PACCAR arose from a claim against truck manufacturers regarding anti-competitive behaviour. The Supreme Court ruling in PACCAR rendered many third-party litigation funding agreements (**"LFAs"**) unenforceable by bringing them into the scope of the regulatory regime for damages-based agreements (**"DBAs"**).

The Bill, introduced to Parliament on 19 March 2024 is short. It amends s.58AA(3)(a) of the Courts and Legal Services Act 1990 – legislation which defines a DBA. The legislation is intended to restore the position as it was understood pre-PACCAR – namely, that LFAs are not DBAs and hence are enforceable. The motivation behind the legislation is to protect the UK's position as a global hub for commercial litigation and arbitration by reducing uncertainty for the future of litigation funding. While introducing the bill the advocate general for Scotland Lord Stewart explained its purpose as follows:

> *"By rendering many existing [litigation funding agreements] unenforceable, the position post-judgment risks undesirable satellite litigation, an increased burden on the courts, and creating an unfavourable market for litigation funding, which, in turn, threatens access to justice."*

The stated aim by government of the legislation (see this Fact Sheet) is to allow the government to deliver a return to a litigation funding regime which promotes access to justice, as well as enhancing the competitiveness of the UK's jurisdiction.

The LFA Bill was debated during the bill's second reading in the House of Lords on 15 April 2024. Issues raised included that the bill would apply retrospectively, the upcoming review of the regulation of litigation funding by the Civil Justice Council, and issues with the complex business models relating to the commercial litigation funding landscape.

In relation to retrospectivity – issues including satellite litigation were discussed, as was the need to ensure that the contractual rights and obligations agreed under LFAs entered into before the Supreme Court's judgment continue to have effect as intended.

Other questions were raised about whether LFAs do function to widen access to justice, and the need to think about other avenues to achieve that stated government intention. The need for alternative funding mechanisms for cases of social importance and legal aid were raised multiple times during the debate. There was also a plea to the litigation funders that they provided support to small but important cases with wide implications and which aren't suitable for conventional litigation funding.

At present the third-party litigation funding market is 'self-regulated' through the Association of Litigation Funders (**"ALF"**), although in the form of costs management and budgeting, there is an element of scrutiny by judges during the course of litigation. Lord Carlile suggested that there should

be *"statutory legislation for litigation funders"* but that they may be willing to move voluntarily to a higher level of regulation. The current approach of self-regulation is for member to subscribe to a code of conduct. The Code of Conduct provides for the capital adequacy of funders, the termination and approval of settlements, and limitations on control, preventing funders from taking control of litigation or settlement negotiation and from causing the litigants' lawyers to act in breach of their professional duties.

During the debate, many spoke to the need for regulation and protection for claimants due to the *"inequality of arms"* between the funders and the claimants, as it was described by Baroness Jones of Moulecoomb. Lord Arbuthnot of Edrom spoke to the fact that *"until Alan Bates secured litigation funding in the Post Office Horizon scandal, the political process had completely failed him and other sub-postmasters."* He concluded that while he did not take the view that the *"litigation funders were unfairly recompensed"* given the *"immense risk"* they took, that there must be a better way – *"Litigation funding must be one method of obtaining redress, but it should be considered alongside others, including the model of regulators-plus-ombudsmen recommended in various books by the chairman of the Horizon compensation advisory board, Professor Christopher Hodges."*

Overall, the bill was widely supported, with many recognising that it solved an urgent problem raised by the Supreme Court judgement in PACCAR. The debate, and forward-looking issues, suggest that the judgement is just the beginning. As described by Susan Dunn, founder of Harbour Litigation Funding in the Law Society Gazette, *"PACCAR is a footnote in history, not a chapter."*

Whilst we wait for legislation post-PACCAR, a recent case sheds light on how Litigation Funders might argue their way around the consequences as they currently stand.

Shaman Kapoor
Call 1999

***Therium Litigation Funding AIC v Bugsby Property LLC* [2023] EWHC 2627, Jacobs J.**

The judgment in this case was handed down on 20 October 2023. Whilst the judgment notes that the substantive litigation was successful following a trial in which Bugsby was awarded substantially less by way of damages than it had claimed, the magnitude of the difference is worth contextualising. In July 2022, Bugsby's claim, which had been for the loss of a chance to purchase, was valued at £366 million in damages but came to be assessed by the English Commercial Court in the sum of £14.98 million. The claim arose from a failed bid to acquire the Olympia Exhibition Centre in London, based on the breach of an exclusivity agreement entered with Legal & General Group ("L&G") which was intended to secure to Bugsby an 18-month timeframe. After 12 months, and in breach of the agreement, L&G was involved in the financing for another bidder for the Olympia which was ultimately the successful bidder in the acquisition. The Commercial Court found that there was a 35% chance overall that Bugsby would have acquired the Olympia if L&G had not offered acquisition finance to the competing bidder, as it was a near certainty that the competing bidder had resource for alternative finance and there were a number of contingencies to satisfy before Bugsby would be the preferred bidder. Whilst still a very significant sum, the damages were just 4% of what had been claimed. Whether in the world of a litigation funder, or simply a claimant, the outcome represented a failure.

Therium funded the litigation pursued by Bugsby against L&G, and, subsequent to Therium's involvement, further funding was provided by Omni. The litigation funding agreements prescribed for any dispute between the parties (funder and Bugsby) to be determined through Arbitration in accordance with the London Court of Internation Arbitration ("LCIA"). Whilst final matters would therefore be determined by arbitrators, in Arbitration proceedings the arbitrators do not have jurisdiction for injunctive relief, and that relief, amongst a limited list of other matters, is preserved to the Court under section 44 of the Arbitration Act 1996.

When the Commercial Court's judgment was handed down, an appeal was launched but, in the end, it came to be compromised. A settlement sum of £27,636,512 was achieved and paid to Bugsby's then solicitors, Candey. Those developments prompted an out of hours application by Omni for an asset preservation order, which claimed proprietary claims over the settlement sum and which sought a proprietary injunction for the proceeds to be held on trust pending any dispute. Therium made a separate application for an asset preservation/freezing order, and that application was listed and heard on Omni's return date. Stewarts, one of the firms instructed by Bugsby prior to Candey's involvement, had also made an application for a similar preservation order.

Readers will be familiar with the well-known *American-Cyanamid* threshold on injunctive relief: namely,

i) whether there is a serious issue to be tried;
ii) the balance of convenience as to the granting of an injunction and whether damages would be an adequate remedy; and
iii) whether it is just and convenient to make the order sought.

The nub of the resistance to the injunctive relief was that there was no serious issue to be tried, in the light of the PACCAR judgment, which we know provided that 'claims management services' as defined by the DBA Regulations 2013 included the services of litigation funders, such that where their agreements were expressed as percentages of the damages, the agreements would be caught by the DBA Regulations and be susceptible to arguments about enforceability. The Court reminded itself that upon an application for injunctive relieve, it was no part of the Court's function to decide difficult questions of law which call for a detailed argument and mature consideration. Moreover, the Court will be more ready to grant interim remedies in order to preserve trust assets (for example, where the applicant has a proprietary claim).

It is fair to note that by the time of the hearing, significant concessions were made about there being a serious issue to be tried in the case presented by Omni, resulting in an undertaking to preserve £13m odd as against that claim. No equivalent concession was made in relation to the claim brought by Therium. Moreover, there was evidence before the Court that Bugsby was insolvent such that the 'balance of convenience' threshold would favour an injunction, leaving the focus on a 'serious issue to be tried'.

The structure of the agreement between Therium and Bugsby is of interest.

First, the parties entered into the Therium litigation funding agreement. This defined, amongst other things, 'Claim Proceeds', which included any and all value, in monetary or non-monetary form, whether actual or contingent. It also provided that the Claimant would agree to hold any Claim Proceeds upon trust for Therium at which point a Claim Proceeds Account would be prepared by Therium and it would deliver the same to each of the parties to the Priorities Agreement for an agreed or deemed outcome. Although the premium sought was staged, the material fee was "3x the Committed Funds…plus 5% of any recovery excess £37,569,295."

Second, the parties entered into the Priorities Agreement together with Bugsby's solicitors at the time.

Third, the parties entered into a funding agreement with Omni.

Fourth, the parties entered into an Amended and Restated Priorities Agreement which bound all previous parties and firms of solicitors as well as the ones then instructed, namely, Stewarts.

Fifth, Omni, Therium and Bugsby entered into a Variation Agreement.

The effect of the Amended and Restated Priorities Agreement when read alongside the Litigation Funding Agreement was that the trust had by then a larger number of beneficiaries, and a different distribution priority. It also set out the waterfall provisions, such that:

- First, Therium and Omni would be repaid the funding they had provided, and any claims paid out by the adverse costs insurer would be repaid. In the event that the Claim Proceeds were insufficient to pay these sums, they would be applied to each receiving party pari passu on a pro-rate basis in proportion to their entitlements.
- Second, Stewarts would be paid such sums as required to bring them up to 100% of their base fees, as with Signature who had been instructed before them. Again, in the event that the Claim Proceeds were insufficient to pay these sums, they would be applied to each receiving party pari passu on a pro-rate basis in proportion to their entitlements.
- Other payments were also set out lower down the waterfall, however they were not material to the application.

Later, upon the Variation Agreement being executed, the waterfall provisions were amended and, amongst other things, provided that none of the changes to the waterfall affected the funders' proprietary rights and other rights to the Claim Proceeds under the Therium and Omni litigation funding agreements.

Therium's claim before the Court was for

i) a declaration that Bugsby holds the Claim Proceeds on trust for it on the terms of the Therium litigation funding agreement;
ii) payment of the sums due to it under the waterfall (claimed at £16.3 million odd); alternatively,
iii) restitution.

It based its justification that there was a 'serious issue to be tried' on the premise that the Court of Appeal in *Zuberi v Lexlaw Ltd* [2021] EWCA Civ 16, had determined that if a contract of retainer contained a provision which entitles a lawyer to a share of recoveries, but also contained other provisions providing for payment on a different basis, or other terms which do not deal with payment at all, only those provisions in the contract of retainer which deal with the payment out of the recoveries amount to the DBA, and thus the term "damages-based agreement" should be given a narrow meaning. Thus, whilst the 5% contingency would constitute a DBA, the 3x multiple would not.

The Court had no hesitation in finding that such an argument did indeed raise a serious issue to be tried. It noted that there had been no authority since *Zuberi* which provided any guidance as to how that aspect of its judgment was to be applied in situations such as the instant. It noted that there was no binding authority contrary to Therium's position and yet Bugsby argued that it had no application in the present context. Given the recent decision in *PACCAR* the Court considered that this was an area where it was appropriate to tread carefully. It saw no merit in the argument, at least in the context of the 'serious issue to be tried' threshold, that because the monies sought were to be paid from the recoveries, that meant very clearly and beyond argument that all monies sought were a contingent fee in the DBA sense.

Although the Court had gone far enough on the point of unenforceability to know that there was a serious issue to be tried, it went on to find that there was also a serious issue to be tried on the question of severance. Distinguishing *Diag*

Human v Volterra Fietta [2023] EWCA Civ 1107, the Court held that *Diag* did not concern a DBA; there was ample room for legitimate argument as to whether or not the considerations which prevented severance in the context of a CFA can be transposed into the DBA context; and *Diag* itself recognised that different public policy considerations were at play as between CFAs and DBAs, together with a different common law and statutory background as between CFAs and litigation funding agreements.

> *"A CFA is illegal at common law, because of the prohibition on champertous agreements. A CFA is illegal unless it satisfies the requirement of the CFA regime…It can be argued that there is no equivalent public policy in relation to LFAs: there was no dispute that in principle these are lawful and do not offend policy (see e.g.* ***Chapelgate Credit Opportunity Master Fund v Money*** *[2020] EWCA 246…)"*

The obligation to hold Claim Proceeds in trust was important. It meant that all Claim Proceeds were caught, rather than a proportion of them equivalent to Therium's interest alone. But it also created a purpose to the trust: to facilitate the distribution in accordance with the agreed Claims Proceeds Account, which distribution was intended to benefit all parties with an interest in the trust monies, including Therium itself. These features weighed heavily in favour of granting the injunction.

What we see is that litigation funding agreements were routinely using methodologies other than just damages-based calculations long before *PACCAR*. The High Court certainly has an appreciation for the policy considerations leading to litigation funding agreements, and even though we have not had corrective legislation yet, *PACCAR* has perhaps not been as mighty a hit to litigation funding agreements of the past, as was first thought it could be. The use of DBAs continues to expand, and the litigation funder forum continues to grow in importance and relevance to high stakes litigation. Whilst this judgment noted itself to be the first reported decision dealing directly with the consequences of *PACCAR*, if the default jurisdiction for funder-client disputes is arbitration, then much of this friction will remain behind closed doors. Nevertheless, the fightback is strong, both at common law and through the efforts to obtain statutory clarity. Without litigation funders in the current climate, there would be a monumental gap in providing access to justice.

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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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Bernard is a highly experienced advocate in both conflict of laws and complex personal injury claims, making him the obvious choice for the most serious cross-border personal injury litigation. He has been ranked in Band 1 for both travel law and personal injury in The Legal 500 and Chambers and Partners for several years. He is the lead author of Accidents Abroad: International Personal Injury Claims (Sweet & Maxwell). Bernard sits as a recorder (part-time judge) and is a qualified mediator. He is approachable and advises on complex issues in a clear, comprehensible way.

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Shaman specialises in costs and litigation funding together with a broader practice in commercial and common law litigation and group action work. He appears regularly in the High Court and the Senior Courts Costs Office, often involved in appellate work or complex points of principle and injunctive relief. His recent involvement in group action work includes the claims against the regulatory bodies in the sport of rugby in the concussion litigation and the civil claims arising out of the Grenfell Tower tragedy. He has experience of representing professional sports players in anti-doping proceedings and has contributed to the editorial work towards the regulation of British Wrestling. He is a Fellow of the Chartered Institute of Arbitrators, having specialised in international arbitration, and receives instructions domestically and internationally. He is a frequent speaker at key seminars on the costs and funding calendar and a contributing editor to Thomson Reuters' *"Costs & Funding following the Civil Justice Reforms: Questions & Answers"*, The White Book. He is a Lead Advocacy Tutor for Lincoln's Inn and has been ranked by the Directories as a leading junior for many years. He is the editor of our bi-annual Costs Newsletter (*3+9 = Costs*) and is joint-head of Chambers' Costs Group. He is appointed as a member of Chambers' Management Board and separately appointed as a school Governor. He is a qualified Mediator and is an appointed Deputy District Judge.

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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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Nyasha maintains a mixed practice across all of Chambers' practice areas with a particular focus on public, commercial and construction law. She is rapidly developing a costs practice with experience in costs in the County Court, High Court, Admin Court and the Court of Protection. Before coming to the Bar, Nyasha worked as a civil servant, political advisor and as a management consultant. Nyasha maintains research affiliations with the Bingham Centre for the Rule of Law, the Harvard Kennedy School and King's College London and acts as an advisor on rule of law issues for the Child Poverty Action Group.

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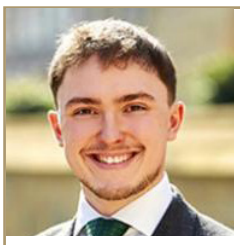

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Christopher accepts instructions in a variety of costs matters. He currently works one day a week with the costs team of a National law firm advising on, and drafting pleadings and witness statements in relation to costs and funding disputes. He assisted Nicola Greaney KC, acting for the successful *Class Representative in Alex Neill Class Representative Limited v Sony* [2023] CAT 73, the first decision to address the validity of a PCR's funding arrangements following the Supreme Court's judgment in Paccar. Christopher also recently acted for APIL, led by Katherine Apps KC, in a judicial review of elements of the new fixed costs regime which concluded by consent following concessions by the Government. Christopher regularly appears in the County Court on a variety of costs matters and has also been instructed to appear in the Senior Courts Costs Office, and Family Court where he successfully opposed the making of a non-party costs order.

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