**Costs Law – Recent Developments – 10th April 2015**

**Harmans Costs Seminar, 10th April 2015**

These notes will briefly address 6 issues relating to recent developments in the law of costs

* The new Part 36 – an overview and some key points;
* Part 36 – a recent developments
* Some brief points on costs budgeting;
* Coventry v Lawrence and additional liabilities – an update;
* Success fees, CFAs and the indemnity principle – recent cases;
* The new test of proportionality – a practical example;

**The New Part 36 – overview and key points**

Substantial amendments to CPR Part 36 with effect from 6 April 2015 by virtue of the 78th update (Civil Procedure (Amendment No 8) Rules 2014 (SI 2014/3299)).

Key changes:

* Form and Content of a Part 36 offer (CPR 36.5);
* Withdrawing and changing Part 36 offers (CPR 26.3, now CPR 36.9 & 10);
* Restrictions on disclosure of Part 36 offers (CPR 36.13, now CPR 36.16);
* ‘Cynical’ offers (CPR 36.17(5));

**Transitional provisions**

Generally, the changes apply to offers made on or after 6 April 2015. However, some of the changes apply to pre April 2015 offers where a trial of any part of the claim or any issue arising in it starts on or after 6th April 2015.

There are four changes to which this applies:

* **The definitions in CPR 36.3** (note, some of these may have a material effect);
* **The revised rules on acceptance of a Part 36 offer in CPR 36.11** (these primarily just reflect changes elsewhere, such as the revised rules on withdrawal and the reference to a trial being ‘in progress’ rather than having ‘started’)**;**
* **The new rule on acceptance of offers in a split-trial case (CPR 36.12).** This is a substantive new provision, which addresses the lacuna that the previous rules anticipated a single trial. Post a split trial, a Part 36 offer that relates only to the parts of the claim or issues that have been decided can no longer be accepted (CPR 36.12(2)). Any other Part 36 offer cannot be accepted earlier than 7 clear days after hand down of the split trial judgment (CPR 36.12(3)). There is no power for the court to ‘order otherwise, though the parties can agree otherwise. This codifies a ‘pause for thought’ – during which the offeror may reconsider the terms of its offer without risk of it being accepted.
* **The revised rule dealing with disclosure of Part 36 offers to the trial judge (CPR 36.16 considered below)**.

**The key substantive changes**

**Codification**

The dictum that Part 36 is a self contained code **(**Moore-Bick LJ in **Gibbon v Manchester City Council; LG Blower Specialist Bricklayer Ltd v Reeves**[2010] EWCA Civ 726**,** [2010] 1 WLR 2081 has now, itself been codified – CPR 36.1.

**Form, content and scope of a Part 36 offer**

**CPR 36.2 introduces some important clarifications.**

A Part 36 offer may be made in respect of the whole, or part of, or any issue that arises in:

(i) a claim, counterclaim or other additional claim; or

(ii) an appeal or cross-appeal from a decision made at a trial (as defined) (**CPR 36.2(3))**.

It follows that a Part 36 offer cannot be made in relation to other matters, for example an interim application or an appeal from a decision on an interim application – though of course ‘Calderbank’ offers may still be made and relief on under CPR 44.2.

The provision on counterclaims, making it clear that counterclaiming Defendants shall be treated as Claimants for the purpose of offers on counterclaims etc. are helpful and seek to address some of the problems that have arisen in cases where judges have had to wrestle with counterclaims or additional claims dwarfing claims etc., though these problems cannot be fully resolved on a broad brush basis.

Part 36 still applies to detailed assessments, with suitable transfer of the meaning of words such as ‘trial’ per CPR 47.20.

**The necessary form of a Part 36 offer is simplified per CPR 36.5**. In particular, the former provision that required the offer to ‘state on its face that it is intended to have the consequences of section 1 of Part 36 (CPR 36.2(2)(b)) has gone, being replaced by a requirement to ‘make clear that [the offer] is pursuant to Part 36’.

This is clearly designed to reduce some of the satellite litigation and problems found in cases such as **C v D** [2012] 1 All ER 302, [2011] EWCA Civ 646 and **PHI Group Ltd v Robert West Consulting Limited** [2012] EWCA Civ 588.

However, it is important to note that there are still 5 mandatory aspects to the form of a Part 36 offer (including being in writing, specifying it is pursuant to Part 36, stating that the minimum 21 day period and its effect, stating whether it relates to the whole claim or, if not, to what and stating whether it takes into account any counterclaim).

Given that the intention is to make compliance simpler, it is not unreasonable to anticipate that any errors of compliance will be looked on at least as harshly, if not more harshly, than before.

**Withdrawing and changing a Part 36 offer**

**A Part 36 offer may now state that it will lapse at the end of the relevant period (CPR 36.9(4))**:

*“after expiry of the relevant period ... (b) the offer may be automatically withdrawn in accordance with its terms”*

This is said by some to ‘overturn’ the decision in **C v D** [2011] EWCA Civ 646 to the effect that a Part 36 offer may not be time limited.

It does not.

C v D remains good law in relation to pre April 2015 offers and on the point that, under the pre April 2015 rules, a time limited offer was incompatible with Part 36.

What the rule change does do is precisely that – it changes the rule, so that post April 2015 an offer may be ‘time limited’.

Note – that the ‘time limit’ cannot take effect before the expiry of the relevant period and cannot prevent an offeree accepting the offer within that 21 day period.

Note, also, that the changes do not affect the point that a withdrawn offer is no longer a Part 36 offer – CPR 36.17(7). A time limited Part 36 offer is therefore only a time limited Part 36 offer if it is accepted (or if judgment occurs before the time limit expires, which seems unlikely). Once the time limit expires, the offer in effect becomes a withdrawn Calderbank offer.

The practical effect therefore is two-fold;

* To allow parties to use one piece of paper and not two – C v D did not prevent parties withdrawing offers after the expiry of the relevant period, but merely prevented them from doing it automatically in the original offer letter;
* To facilitate the greater use of time limited offers;

Note, also that the restriction on the offeror’s ability to withdraw or change the terms of an offer during the relevant period so as to make it less advantageous remains and is re-stated (CPR 36.9 & CPR 36.10).

**Restrictions on disclosure of a Part 36 offer**

This has long been a problem with split trials and has led to a number of cases (including in detailed assessments) where the courts have been unable to deal with costs of preliminary issues, because, whilst the court could be told in clear terms that there were no Part 36 offers (if that was the case), if there were Part 36 offers he could not be told that there were (!), let alone the terms of them, even if they were wholly irrelevant to the outcome of the preliminary issues / split trial or if the outcome of the split trial meant they had clearly been bettered (or not) (see, inter alia, **Ted Baker PLC v Axa** [2012] EWHC 1779).

CPR 36.16 and the new CPR 36.16(3)(d) now address this. In short, in any split trial / preliminary issue case, if offers have been made which relate only to the issues that have been decided, the trial judge may be told of them. He may also be told that there are other offers, though not the terms of them (unless any of the other exceptions under CPR 36.16 apply).

This facilitates the judge now being able to deal with preliminary issue / split trial costs more frequently and effectively where Part 36 offers have been made. It is not a cure all, but it is a major improvement.

**Cynical offers (CPR 36.17(5))**

Apparently Claimants have been abusing Part 36 by making offers of minimal reductions (99% on liability or similar) in order to try and obtain what are now the CPR 36.17 additional benefits (indemnity costs, enhanced interests and 10% on judgment sum).]

This is an age old problem – see, for example, *Huck v Robson* [2002] EWCA Civ 398, [2003] 2 WLR 1340 **(**95% offer on liability) where the CA held that, whilst it was not unjust to allow the indemnity costs award to stand in that case,

*‘‘If it was self-evident that the offer made was merely a tactical step designed to secure the benefit of the incentives provided by the rule (eg an offer to settle for 99.9% of the full value of the claim) …the Judge would have a discretion to refuse indemnity costs.’’ (paragraph 71)*

See also **AB v CD** [2011] EWHC 602 (Ch) where Henderson J commented that a valid Part 36 offer;

*‘‘…must contain some genuine element of concession on the part of the claimant, to which a significant value can be attached … A so-called ‘settlement’ which was all take and no give would in my view be a contradiction in terms.’’*

Apparently in order to expressly address this point, CPR 36.17(5)(e) adds a new factor to those which the court must consider in deciding whether it would be unjust to make the ‘usual order’ (so this includes both Claimants seeking additional benefits and Defendants simply seeking a costs ‘switch’, namely ‘*whether the offer was a genuine attempt to settle the proceedings’*.

Without seeking to be unduly cynical, it had been hoped that the CPRC would have recognised the difficulties with provisions of this kind following the ‘more advantageous’ debacle post **Carver v BAA** [2008] EWCA Civ 412, cured by the provision now at CPR 36.17(2).

It appears the position is now that the offeror may be in a position where the outcome for it is better than what it offered to allow the offeree to accept, and the offer is one which is Part 36 compliant, and which does not conflict with any of the other reasons at CPR 36.17(5), but where it may be denied the automatic costs consequences because, despite this, the offer was not a ‘genuine attempt to settle’. In what circumstances is an offer, for example, to take something less than you are entitled to, even by only a modest sum, not an attempt to settle? Is it because, taking all the circumstances into account, the court regards the overall outcome as not genuinely being ‘more advantageous’?

**Other Matters**

**Costs Budgeting and the dreaded CPR 3.14**

What happens where a party has been subject to the CPR 3.14 sanction, but is then awarded its costs under CPR 36.13 or 36.17. This includes, under CPR 36.17(4)(b) – where the Claimant is awarded indemnity basis costs.

CPR 36.23 now expressly addresses this. The party receiving the Part 36 costs from the end of the relevant period shall be entitled to 50% of what those costs would have been without the CPR 36.14 restriction.

The aim, of course, is to stop the effect of a CPR 31.4 sanction applying removing any potential threat caused by that party making Part 36 offers and to recreate a costs risk for the other party in such circumstances.

Note, a number of peculiarities and specific points arise from this:

* CPR 36.23 provides no remedy from CPR 3.14 for any costs apart from those after the expiry of the relevant period of the Part 36 offer. It is not, therefore a cure all;
* CPR 36.23 expressly refers to CPR 36.17(4)(b) – this is the Claimant’s entitlement to indemnity costs for achieving a judgment at least as advantageous as the Claimant’s offer. Given that CPR 36.23 is a concession, indicating that in such circumstances, the Claimant will be entitled to 50% of the indemnity basis costs it would have been entitled to but for the CPR 3.14 sanction, it carries with it the implicit suggestion that the CPR 3.14 sanction applies to indemnity basis costs (as to which, see Coulson J in **Elvanite v AMEC** [2013] EWHC 1643 (TCC)at [28], HHJ Keyser QC in **Kellie v Wheatley & Lloyd** [2014] EWHC 2886 (TCC) at [17] and HHJ Simon Brown QC in **Slick Seating Ltd v Adams** (May 2013) at [10]); .

The law of unintended consequences?

In passing, note also the new pre action protocols which took effect on the 6th April 2015 and which were released to the public on the 9th April 2015 (!)

**Part 36 in practice – very recent case law**

There are a number of ongoing Court of Appeal cases on the previous Part 36. Recent developments include

**Shaw v Merthyr Tydfil BC** [2014] EWCA Civ 1678

Shaw concerned a party that had made a Part 36 offer, but in terms as required by the previous version of Part 36, not the one current at the time of the offer. As a result, it did not contain the stipulation that it was made ‘in

Shaw concerned a party that had made a Part 36 offer, but in terms as required by the previous version of Part 36, not the one current at the time of the offer. As a result, it did not contain the stipulation that it was ‘intended to have the consequences of Section 1 of Part 36’, even though it was clearly intended so to do.

As a result, it was held not to be a Part 36 offer, a decision upheld by the Court of Appeal.

It seems clear that if this had been an issue of contractual construction under the usual laws of contract, there would have been no doubt as to the offeror’s intention. The case therefore further confirms that Part 36 is divorced from such rules and that the rules will be strictly applied as a self contained code.

(note, a second case to the Court of Appeal (Bush v Millett) is underway on a very similar point). In practice, it expressly seeks to ask the Court to reconsider its approach in Bush and to take into account additional factors. It will no doubt also lead to a consideration of the new Part 36 (even though it is not strictly applicable) and may be one of the first Court of Appeal cases to give useful guidance in this area.

**Webb v Liverpool Womens’ NHS Foundation** Trust [2015] EWHC 449 (HHJ Saffman)

This very recent decision related to a clinical negligence Brachial Plexus claim. The Defendant was held to have been negligent and the Claimant was entitled to damages, but was unsuccessful in a number of allegations.

The court held that it was clear that the Claimant had bettered her own Part 36 offer. However, the Court considered that it would not be unjust for the Claimant to have her Part 36 enhancements in light of beating her own offer.

However, the question was Part 36 enhancements to what? The court, relying on **Thinc Group Ltd v Kingdom** [2013] EWCA Civ 1306, held that Part 36 – now CPR 36.17 - did not prevent the court from considering whether it was unjust to award the Claimant 100% of her costs for any period.

As a result, the court decided to award the Claimant a percentage of her costs only. That percentage would, for the relevant period, include the Part 36 enhancements, but those enhancement would still only apply to the percentage costs awarded overall.

What the percentage was is to be decided on a later date.

The case cries out for consideration by the Court of Appeal though, in the usual way, whether this will happen remains to be seen.

**Some brief points on costs budgeting**

The hotbed of judicial interpretation of costs budgeting is the TCC, not least because budgeting is done by High Court judges and the cases are reported. Coulson J is in the vanguard.

The most recent and significant case is **CIP v Galliford Try**.

Two important issues are raised and addressed in this case (in two separate judgments);

* Application of CPR 3 Part II to ‘exempt’ cases;
* The incurred costs / budgeted costs dilemma;

*Issue 1 - ‘exempt’ claims*

This is addressed in Judgment 1 – [2014] EWHC 2546 (TCC). Coulson J addresses both ‘old’ and ‘new’ regime (i.e., pre and post the April 2014 modification to CPR 3.12);

The first (and somewhat surprising) issue was, did the court have a discretion to bring a case that was outside automatic costs budgeting within costs budgeting?

The answer was obviously ‘yes’ – paragraph 19.

Coulson J noted that the use of CMOs should ‘always’ be considered, even in cases prima facie outside costs budgeting (paragraph 20);

The second question was whether that discretion was fettered?

* No. No presumption either way CPR 3.15(1) – ‘*manage the costs to* be incurred’;

Issue 2 - The incurred costs / budgeted costs dilemma

Addressed in Judgment 2 [2015] EWHC 481 (TCC)

CPR 3 PD 3E Paragraph 7.4 – ‘*the court may not approve costs incurred…[but]…may record its comments…and will take those costs into account when considering…all subsequent costs.”*

How does this work in practice?

**Redfern v Corby BC**[2014] EWHC 4526 (QB) (appeal to the Court of Appeal compromised);

* Must the court allow a reasonable and proportionate figure for future phases, even if past costs are excessive?
* Can a court set a total figure, past and future, and then budget the future costs just on the basis of ‘what’s left’?
* How should the court ‘take into account’ past costs?

“*The only way in which one can take into account excessive costs already incurred in determining the reasonableness and proportionality of subsequent costs is to limit the approved subsequent costs at figures below what they might otherwise have been approved at but for the excessive sums which have already been expended*.”

(Redfern, paragraph 32, HHJ Seymour QC)

However, contrast the approach of Warby J in **Yeo v Times Newspapers Ltd**[2015] EWHC 209 (QB)

* *“The court may reduce a budget for reasons which apply equally to incurred costs, or for reasons which have a bearing on what should be recoverable in that respect, for instance, that so much had been spent before the action began that the budgeted cost of preparing witness statements is excessive.” (paragraph 61)*

How was the issue addressed in CIP v Galliford Try?

C’s budget £9.2m (£4.2m incurred, £5m future);

C’s previous estimate £1.5m incurred, £3.4m total;

C’s budget was found by Coulson J to be ‘wholly unreliable’ [25-6] & [35] and ‘wholly disproportionate’ [40].

The court refused to allow the flaws to prevent it approving a budget (contrast *Willis v MJR Rundell*);

The court also refused to ‘just’ approve future costs and leave incurred costs to D/A with ‘comments’ [90-91];

Should the court therefore set the future costs budget at ‘nil’ since C had already spent everything that was reasonable to spend – the Redfern option?

The answer was ‘no’ – because this would ignore the effect of assessment on the incurred costs [92];

The answer therefore was [96-98]:

* To use the ability to ‘comment’ on incurred costs to set figures which are reasonable to be allowed on assessment for each phase of incurred costs;
* To then set the budget for future costs on the assumption that on assessment C will recover no more per phase than that ‘commented’ figure;
* To the extent that, on assessment, C recovers more than the ‘commented’ figure there will be an automatic deemed reduction in the budget for future costs in that phase ;

Example;

* Experts - £1.2 million incurred to date, £1m future;
* Judicial comment – the reasonable spend to date is £550,000 and no more than that should be recovered on assessment;
* In light of that, the reasonable future spend is £650,000 and the future costs are approved in that sum;
* If C recovered more than £550,000 for past costs on assessment, then for each £1extra recovered the £650,000 future budget will be reduced by £1;
* The total incurred and future costs for that phase are £1.2m – equivalent to C’s estimate of past costs:

The living budget – but is it right? The Court of Appeal will no doubt tell us – but probably not in this case.

Note also **Parish v The Danwood Group Ltd** [2015] EWHC 940 (QB) – a classic example of the dangers of the dilemma of ‘do I ask the trial judge to revise my costs budget’ or ‘do I leave it for assessment and argue ‘good reason’’?

**Coventry v Lawrence & additional liabilities – an update**

Heard February 2015. Judgment expected mid 2015, but no date set and no draft judgment yet.

Not clear whether there will be a single judgment or any dissent.

The argument appears to be limited to those cases where the paying party if not backed by or is not itself someone with substantial resources. However, the argument that the overriding objective requires a consideration of the ‘financial circumstances’ of all parties when assessing additional liabilities appears to have wide implications and, if accepted, appears also to apply to assessment of base costs.

The Supreme Court judgment may not be the end of the road and the Court itself has already envisage that it may decide the matter on the narrow facts / application tot eh peculiar circumstances of Coventry and leave other issues to be decided by it on another occasion.

In the interim, we have had **McGraddie v McGraddie** [2015] UKSC 1 – a rare Scottish case with relevance to English & Welsh costs law.

The key point was that there was no equivalent in Scottish Law to s.29 Access to Justice Act 1999. It was s.29 that made an ATE premium part of ‘costs’ in relation to English & welsh courts’ discretionary power to award costs under s.51 Senior Courts Act 1981.

In the absence of such a provision in Scotland, the premium, which itself was held to have been reasonably incurred, was simply not an item of costs, of ‘expense’ which could be recovered.

This case may be material since it strongly supports the argument that anything that falls outside the ambit of the narrow exceptions to the effect of s.46 LASPO will be wholly irrecoverable in any claim for costs.

There will be a number of arguments in due course about the construction of s.46 and the transitional provisions, for example in relation to second policies or top up premiums, and McGraddie seems to confirm that unless a party can clearly bring itself within the transitional provisions or an exception there will be no wider scope to try arguing for recovery of such premiums.

Mention of ATE premiums cannot pass without some mention of the apparent rise in reliance on the **Kelly v Black Horse** [2013] EWHC B17 approach. The ending of recoverability of additional liabilities has encouraged some judges to regard the condemned regime in a new light – or at least to regard it in the same light, but more openly.

**Success fees, CFAs and the Indemnity Principle – recent developments**

**Dalton v BT** [2015] EWHC 6116 (QB) (Phillips J)

This case concerned the long running issue of ‘what is a disease’ for the purposes of CPR 45 Parts IV and V and, in particular, whether NIHL was / is a disease within the meaning of the relevant section of the CPR.

NIHL was held to be a disease for those purposes.

Insurers were criticised for attempting to go behind the clear agreement that had been reached in the ‘Big tent’ discussions that NIHL was within the category of diseases for the purposes of the fixed success fee rules.

Although not directly in issue, the decision cast very clear doubt on the correctness of Patterson v MOD [2012] EWHC 2767 (QB) in relation to the similar issue in the context of NFCIs and appear to do so form a very sound basis of having considered in much closer detail the relevant matters which went to the making of the applicable rules.

The decision strongly supports the logically defensible position that dictionary and medical definitions of such matters must give way to the intention of the rule makers when that intention can be clearly identified.

**Cox v Woodlands Manor Care Homes** [2014] EWCA Civ 1068

Cox related to the ‘old’ Cancellation of Contracts made in a Consumer’s Home or Place of Work etc. Regulation 2008, replaced with effect from June 014 with the ostensibly less draconian Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

Its core point is to serve to confirm that the Court of Appeal had little problem with the concept that a breach of such consumer protection regulations, even if it had no direct effect whatsoever on the paying party, could be relied on by the paying party to hold the CFA unenforceable and therefore to avoid the paying party’s liability.

Indeed, the case was one of the starkest examples of where the paying party openly accepted that it had suffered no prejudice and that it was taking a purely technical point in the face of a Claimant and her solicitor who were as one that any breach should be waived, yet the Court of Appeal robustly rejected any appeal.

The case has relevance both to a substantial number of 2008 regulation cases (in particularly those of higher value, particularly in the field of clinical negligence and personal injury) but also to the question of how the Court may approach breaches of the 2013 Regulations.

**Blankley v Central Manchester & Manchester Children’s University Hospitals NHS** Trust [2014] EWCA Civ 18

To those with limited outside interests Blankley was perhaps the most disappointing decision of 2014. The issue of the effect of a loss of capacity on a retainer and related issues of frustration, the role of a litigation friend and other related matters is one which has been crying out for proper and detailed consideration by a high appellate court for many years.

Blankley was the ideal opportunity to do so.

Unfortunately, the Court of Appeal dealt with the matter in a very perfunctory way, primarily related to the facts of the individual case and with little reasoning to assist in other cases. Given that the judgment below of Phillips J was unsatisfactory in a number of ways (without necessarily being wrong) this was very unfortunate.

At its highest, Blankley can be taken to confirm that in certain circumstances a transient loss of capacity does not automatically end a retainer. Secondly, to confirm that in appropriate circumstances the two issues of the agency retainer of the solicitor and the precise contractual terms of business on which the solicitor is retained may be divorced, such that even if the latter ends for a short period, the former may continue.

Unfortunately, the core issues relating to Yonge v Toynbee and the broader effect of loss of capacity on retainer were sidestepped, as they had been by the Supreme Court in **Dunhill v Burgin** [2014] UKSC 18, despite the Court of Appeal expressly accepting that there was ‘much to be said in favour of a fresh examination or reconsideration’ of these issues.

Perhaps the most pertinent, but slightly overlooked, point, is the Court of Appeal’s express acceptance in passing that a solicitor’s retainer was to be regarded as a personal contract. This issue is one which might be of key importance when the question of assignment of CFAs eventually comes to be considered by the Court of Appeal and/or Supreme Court and Richards LJ’s dictum in this regard might well come to be cited back to the Court at that time.

**Proportionality in practice – an example**

The new test of proportionality has been the subject of much discussion, including comment from the Senior Costs Judge. We will await Court of Appeal intervention before final decisions can be made.

**Savoye v Spicers Ltd** [2015] EWHC 33 (TCC) was, however, a useful example of its operation in practice, at the sharp end (a summary assessment) where robust assessment might be anticipated to take place.

In short, the costs claimed were more than halved.

The costs claimed were, in practical terms, roughly a quarter (£201,790.66) of what was, for practical terms, in effect a judgment award in an adjudication (£899,300), which was upheld in subsequent court proceedings (which was what the costs order related to).

Indemnity costs were sought by the successful party – in what appears to have been a fairly transparent attempt to avoid the effects of the new rule on proportionality.

That application failed, and led the judge on to consider whether the costs claimed were disproportionate. The judge held that on a broad brush basis, and without considering the figures, he would have thought that the appropriate costs figure was about half of that claimed.

In a remarkable act of judicial prescience he then went on to consider the detail of the costs claimed and arrived at a summary assessment figure – without regard to his provisional view – of just short of half of the costs claimed.

The case does not advance any remarkable legal precedent. It is, however, one of a number of stark examples, particularly from the TCC and Commercial Courts (see, for example, Males J in **Vitol Bahrain v Nasdec** [2013] All ER (D) 38)), of substantial costs reductions on the basis of proportionality, even where the judgement sums or sums at stake in the claim very substantially exceed the costs claimed (and even where both sides have spent similar sums).

The old idea, if there was one, that proportionality was an issue where the base costs were close or exceeded the sum in issue is no longer a good rule of thumb if ever it was. Judicial appetite to regard sums less than the sum in issue as nevertheless being disproportionate and to take a robust approach to such claims appears to be growing.

In addition, in commercial cases, the combination of the new rule on proportionality and the impact of costs budgeting appears to be undermining the general approach, once prevalent, that in such cases the courts were not concerned as to the costs the parties were incurring and that this was a matter primarily for the parties themselves and not the courts.

It might be suggested that the introduction of the Jackson reforms has resulted in an increased judicial interest in costs in these areas and that this may be a genie that will be very difficult to put back in the bottle.

Roger Mallalieu

4 New Square

April 2015