Costs Law Update by Partner and Costs Lawyer Gary Knight

***Lowin v W Portsmouth & Co LTD* [2016] EWHC 2301 QBD Elisabeth Laing J - 20/06/16**

An appeal against a decision of a Costs Judge following a provisional assessment of the receiving party's costs.

The Claimant was entitled to costs following a successful claim for damages arising from the death of the Claimant's mother as a result of malignant mesothelioma. Damages were recovered in October 2014 in the sum of £70,200.

The Claimant made a Part 36 offer in respect of costs for £32,000. Absent acceptance the matter proceeded to a provisional assessment in respect of the Bill of Costs which sought in excess of £55,000.

The provisional assessment undertaken on 8 February 2016 resulted in the allowance of costs in the sum of £32,255.35 and the Costs Judge ordered that pursuant to the provisions of CPR 36.17(4) the Defendant was to pay interest on costs at a rate of 10% per annum for the period 21 days from the Claimant's Part 36 offer plus costs of the assessment to be summarily assessed on the indemnity basis with interest on those costs at 10%.

The Claimant produced a statement of costs for the assessment amounting to £6,091.20 the Costs Judge assessed the same at £2,805.

In giving reasons for his decision the Master considered that whilst an assessment of the Claimant's costs could properly be undertaken pursuant to Part 36.17(4) (c) this did not "dislodge the effect of CPR 47.15(5) which has the effect of trapping the "maximum amount the court would award" to the receiving party to £1,500 plus VAT plus Court fee…"

The Claimant sought leave to appeal, the Costs Judge refused the application referring to ***Broadhurst v Tan*** [2016] EWCA Civ 94 and finding, in the view of the Costs Judge, the same to have "*no application as there is a contractual difference between "fixed costs" and as here, assessed costs subject to the cap in CPR 47.15(5)."*

Notice of Appeal was filed and leave to appeal granted.

The Appeal was heard by the Judge with Master Leonard sitting as a Costs Assessor.

The matter of "***Broadhurst***" was considered in great detail as was the relationship between Part 36 and Part 47.

The Judge (and costs assessor) considered there to be a conflict in a sense between Part 47.15(5) and Part 36 in that r 47.15(5) potentially derogated from the entitlement to having costs assessed on the indemnity basis conferred by Part 36. "*For it to derogate in fact, the draftsman would, it seems to us, have had to provided specifically in rule 47.20 that the provisions of Part 36 would not apply to the costs of the detailed assessment with modifications that included 47.15(5)".*

It seems to us (see paragraph 32 of the judgement) that, because he has not so provided, it must follow that the provisions of Part 36 apply to this case and that they should not be displaced by a provision of rule 47.15(5).

Addressing the arguments raised by both parties urging the Judge on the undesirable consequences of accepting the other side's argument, the judge added *"It seems to us that there is one potentially undesirable consequence from our conclusion. That is that it may reduce the incentives for people to keep the costs of a provisional assessment as low as possible. On the other hand, it seems to us that, one consequence of our conclusion is that it increases the incentives on parties to accept sensible Part 36 offers because, if they do not, then there is the potential for them to incur further costs if that rejection is proved wrong by a detailed assessment."*

Accepting the Claimant's argument on the construction of the two provisions was correct, the appeal was allowed.

Harmans comment – Why did the claimant not seek/recover the extra 10% on the costs recovered per 36.17 (4)(d)?

Bolt Burdon Solicitors v Aijaz Tariq and 2 others **[2016] EWHC 1507 QBD Spencer J - 22/06/16**

A judgment that considers three issues of a successful Part 36 offer in a dispute.

Following a dispute between the parties an order was made that the Defendants do pay the sum of £498,083.52 together with contractual interest at 8% totalling £50,706.44;

The Defendants were to pay an "additional amount" in the sum of £49,808.35 being 10% of the judgment (less the contractual interest awarded) pursuant to CPR 36.17(4) (d).

Absent agreement three issues required further determination:

(a) the operation of CPR 36.17 and in particular:
    (i) whether any additional amount was payable by the defendants pursuant to Part 36.17(4)(d) in relation to the award for contractual interest
    (ii) the rate of interest on the claimant's costs prior to judgement
(b) the amount of a payment on account of costs

Part 36 was reviewed at some length with Mr Justice Spencer referring to the "additional amount" as, in effect, a "*further head of damages*".

Accepting the submission made for the Claimant by Counsel the judge considered the wording of the Rule to be clear finding the additional amount was to be calculated by applying the prescribed percentage to "*an amount which is…the sum awarded to the claimant by the court*".

Counsel for the defendant submitted that the allowance of interest above the contractual rate of 8% would be "*unjust*" being far higher than the Claimant's true costs of borrowing, the Judge however considered the submission to be "*misconceived*" in that the parties had contracted for interest at 8% if the sum due was not paid on time. Finding the entitlement became part of the award Spencer J ordered that in addition to the sums payable at paragraph 2 of the interim order the defendants

should pay the claimant, as part of the "additional amount" to which the claimant was entitled under CPR 36.17(4)(d), the sum of £2,631.15.

The parties agreed that under CPR 36.17(4) (c) the claimant was entitled to interest on costs awarded at a rate not exceeding 10% above base rate and by further agreement interest to be paid at a rate of 4% above base rate from the date on which the work was undertaken or the liability for the disbursement was incurred, or 9 March 2015 whichever was the later.

There was some discussion with regard to what, if any, further payment on account was to be made with reference to budgets filed, Mr Justice Spencer "exercising a degree of caution" limited the amount to 80% of the costs budget.

Aliston Albert Ashman v Clyde Caulson Thomas **[2016] EWHC 1810 Ch. Master Matthews - 19/07/16**

The master gave judgment in preliminary issues and awarded the costs of those issues to the defendant, to be assessed if not agreed. In seeking to agree the terms of the order counsel for the defendant sought to include a term providing for a payment on account of costs. The defendant provided a schedule seeking £48,647.70, the claimant resisted any such order.

The claimant argued that any request for a payment on account ought to have been made at the time the costs order was made; in the alternative an interim costs certificate may be issued at any time after to commencement of the detailed assessment process but in this case no detailed assessment proceedings had yet been commenced.

The claimant also sought to argue that it was inappropriate to deal with the matter by way of written submissions, and that in any event the defendant had failed to provide the schedule of costs 24 hours before the hearing.

Master Matthews considered the substantial point was whether a request for a payment on account can only be made at the hearing itself. If so, then when the parties came to draw up the order for the court's approval, it was too late to argue for its inclusion.

Consideration was given to CPR rule 44.2(8):

> "*Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so"*

Master Matthews considered the mandatory terms of the rule meant that there was even more reason to exercise the power when the matter was drawn to the court's attention than there might otherwise be; concluding that there was "*no objection in principle to considering the request for a payment on account when this was sought after the hearing but before the order was sealed…*"

Suriaya Jamadar v Bradford Teaching Hospitals NHS Foundation Trust **[2016] CA (Civ Div) Jackson LJ, Lindbloom LJ - 21/07/16**

The claimant had received negligent treatment resulting in the amputation of one leg. Proceedings were begun with the defendant denying liability. The court sent the parties a form N149C pursuant to CPR r26.3 stating the claim was defended and appeared suitable for allocation to the multi track.

The defendant admitted liability shortly after the notice was provided and the judge revoked form N149C entering judgment with damages to be assessed.

Notice was then given to the parties providing for a case management conference; the defendant provided its budget to the claimant however the claimant failed to provide his own budget despite requests from the opponent.

At the CMC directions were provided including the appointment of five experts on each side, leading towards a five-day trial on quantum. The district judge approved the defendant's budget and ordered, pursuant to r3.14 that the claimant's recoverable costs be limited to court fees. The claimant applied without success for a variation of the order or for relief from sanctions, the district judge finding the case to be factually so close to ***Mitchell***. The appeal was refused by a circuit judge holding that the claim was self-evidently a multi-track case to which r3.13 applied and the claimant was in breach. Consideration was given to both ***Mitchell*** and ***Denton*** and the circuit judge concluded the refusal to grant relief from sanction was correct.

In the appeal to the Court of Appeal the claimant submitted (1) that the circuit judge had been wrong to hold that r3.13 applied; that the order revoking the N149C had the effect of stopping the case from being in the multi-track and as r3.12 did not apply there had been no obligation on the claimant to provide a budget (2) that both the district judge and circuit judge had been wrong not to allow the claimant relief from sanction.

Their lordships held (1) the order revoking the form N149C had been made as liability was no longer disputed, however the case was self-evidently a multi-track case precisely why the same was listed for a two hour CMC. Reference was made to the fact that the parties had agreed to the extensive list of expert witnesses and the fact that damages sought were in the region of £3 million adding that nobody could seriously think the matter could sensibly proceed as a fast-track case. Rules 3.12 and 3.13 applied and the fact that the claim was quantum only did not take the case of the costs management regime (2) the district judge had been wrong to find that the instant case was factually so close to ***Mitchell*** that he was bound to follow it as that was the wrong approach following Denton. The circuit judge had properly applied the three-part test in ***Denton*** – first there was clearly a serious breach which would have resulted in there having to be a further CMC, one likely to be costly and demanding of court time with management of the case and of the costs having to be dealt with separately; second both the district judge and the circuit judge had rejected in strong terms the "reasons" for the breach and the Appeal court was not minded to overturn their assessment – the circuit judge had properly set out the guidance in Denton regarding the third part of the test and had taken account of the factors in r3.9(1)(a) and (b) and had reached a decision open to him.

In the judgment Jackson LJ acknowledged that other judges "*might have been more lenient*" but that the decision was "*within the ambit of his discretion."* The appeal was dismissed.

***Various Claimants v MGN Limited [*2016] EWHC 1894 Ch. Mann J - 25/07/16**

On 21 July 2016 Mr Justice Mann gave his judgment at a costs management hearing and provided his written judgment shortly thereafter addressing, what he described as "*an important overarching point*" being the extent to which additional liabilities should be covered by the costs budget.

The claimant's position being that all additional liabilities are outside the scope of the costs budgeting exercise which should be only concerned with base costs with the defendant suggesting that both the success fee uplift and ATE insurance premium should be included.

Mr Alexander Hutton QC for the defendant suggested the correct approach was to follow a procedure "akin to the approach on detailed assessment" that is to decide common costs budgets using the test of reasonableness; decide the reasonable level of base costs for each phase then stand back and consider a proportionate amount to be allowed with any deductions resulting from the "stand back" exercise to be applied pro-rata to each phase. Mr Hutton QC referred to the approach adopted by Master Gordon-Saker in the matter ***BNM v MGN Ltd***.

There is of course, no obligation on the claimant to disclose the amount of success fee or the ATE premium, the theory being that disclosure would reveal to the opponent the rationale behind the perceived view of the prospects of success. It would appear that the defendant was relying on the "new" approach to proportionality for post April 2013 matters allowing the courts to exercise control at an early stage over the total costs being incurred, allowing the court to do so prospectively and not just retrospectively and also providing to the paying party a degree of certainty as to the liability for the total costs.

Mann J did not consider "*the apparent change in the approach to proportionality on assessments (if there is one) means that there should be a change to the approach on the occasion of budgeting."*

The judge referred to the provisions for costs budgeting including the requirement for the budget to be in the form of Precedent H (as attached to the practice direction).

In particular the judge made reference to the summary on page one of the precedent which included the following:

"*The estimate <u>excludes</u> VAT (if applicable), success fees and ATE insurance premiums*…"

The judge considered the above to be a "clear direction" as to what was not to be included; the judge went on to point out that the accompanying notes for guidance made no suggestion that anything should be included with regard to additional liabilities.

Not surprisingly the judge rules that the determination of figures in the costs budgeting exercise shall not include any sum for the additional liabilities.

Mohammed Azim v Tradewise Insurance Services Limited **[2016] EWHC B20 Costs Master Leonard 22/08/16**

Master Leonard undertook a detailed assessment of the claimant's costs incurred in a personal injury claim following a road traffic accident pursuant to the claimant's acceptance of the defendant's Part 36 offer in the sum of £3,500.

The claimant had been represented by three firms of solicitors under CFAs.

CFA1 dated 19 October 2011, CFA2 17 January 2013 (retrospective to the date of initial instructions received November 2012) CFA2 was assigned to new solicitors on 23 July 2014.

Issue was taken by the defendant as to the validity of the assignment of the CFA in July 2014 and, in consequence, with the right of the claimant to recover any costs.

The defendant raised three issues:

1) Whether the claimant's retainer with his solicitors had been terminated by then at the time of the assignment arrangement;
2) Whether it was possible to lawfully assign the CFA in the manner attempted by the claimant;
3) Whether (assuming that lawful assignment was possible) such assignment was effective.

The master considered evidence produced including a letter 23 July 2014 whereby Solicitor 2 assigned a number of CFAs referred to in an attached schedule.

The letter included:

Pursuant to and for the consideration set out in the Sale and Purchase Agreement between us and you dated 23 July 2014, we assign all our rights, title and benefit in and to the contracts to you (the Agreement')…"

The schedule included the claimant's CFA.

The same date the claimant was advised by Solicitor 2 as to the transfer of the claim and consent to transfer form was enclosed and duly signed 31 August 2014.

In supplemental Points of Dispute the defendant pursued arguments based upon the proposition that by "*selling*" Solicitor 2's CFA to Solicitor 3, Solicitor 2 received payment of fees under the CFA and thereby terminated it. In the alternative that the fees earned by Solicitor 2, being for present purposes unquantified, were irrecoverable however, the costs judge found he was unable to identify a sound basis for either argument but as they did not fall within the issues to be determined, as identified by counsel at the hearing, the same did not need to be addressed.

The costs judge considered that the defendant's case on termination rested with two overlapping propositions – firstly that there was no effective assignment of the CFA from Solicitor 2 to Solicitor 3 and if that was correct it would follow that Solicitors 2's letter to the claimant (incorporating as it did an unequivocal statement to the effect that Solicitor 2 would no longer act) could properly be said to have terminated Solicitor 2's CFA. Secondly the proposition was that the assignment arrangement

could not be effective precisely because Solicitor 2, at the point of purporting to assign, had terminated or did terminate the CFA.

Addressing the second proposition the costs judge considered it was appropriate that Solicitor 2 wrote to the claimant to give notice of assignment and to explain to the client (as they did) the claimant's option of instructing other solicitors should he wish. The costs judge considered that this seemed to offer no real basis for concluding that the CFA had been or was terminated at the time Solicitors 2 and Solicitors 3 entered into the transfer arrangement.

The costs judge referred to the defendants argument that the notice of assignment should be construed as a termination of the CFA, "*even if that is right (and I do not accept that it is) such notice had not been given at the point of executing the assignment. Following assignment it cannot (again assuming, for present purposes, that the assignment was valid) have been open to Solicitor 2 to terminate it".*

The costs judge concluded that if the assignment arrangement of 23 July 2014 was in itself invalid then there was no sound basis for concluding that Solicitor 2's CFA was, at any stage, terminated and turned to the question of whether the assignment was valid.

The costs judge's judgment refers to the various cases considered including *Jenkins v Young Brothers, Jones v Spire Healthcare, Webb v London Borough of Bromley* and *Budana v Leeds Teaching Hospitals* and records that he was unable to identify any obstacle in the principles governing assignment of the benefit and burden of contracts, to the validity of a bona fide, arms-length CFA assignment in the circumstances of this case.

The costs judge then considered if the assignment was effective with the defendant arguing the failure to disclose all of the contractual documentation raised sufficient doubt as to the compliance with the statutory requirement being met and referring to CPR 44.3(2)(b) the defendant submitted that the benefit of must be resolved in favour of the paying party.

The defendant's submissions were not accepted by the costs judge who viewed CPR 44.3(2) (b) as addressing only the resolution of doubt in relation to the reasonableness or proportionality of costs and did not create a general exception to the established rules of evidence though the costs judge agreed that it was incumbent upon the claimant to demonstrate that the assignment relied upon was valid he was satisfied that the documents disclosed by the claimant were perfectly sufficient.

On the documents provided the costs judge found no sound basis for concluding that the assignment of the CFA in any way failed to comply with the provisions of section 136 of the Law of Property Act 1925.

Richard Andrew Campbell v Robert Campbell **[2016] EWHC 2237 Ch. Chief Master Marsh 13/09/16**

The Chief Master considered two issues:

1) The extent to which the costs management regime under CPR 3.12 to 3.18 applied to the costs of a litigant in person
2) The scope of litigant in person costs recoverable under CPR 46.5 where the litigant in person obtains legal assistance from a solicitor and a member of the bar

The issues arose from the dispute between two brothers who jointly owned valuable interest in jewellery manufacturing, retail and wholesale business.

During the dispute a deputy master had given directions to bring the claim to trial with the trial due to take place in November 2016 over 8 days. At the same time an order was made requiring the parties to produce to each other an extensive range of documents relating to the business. The deputy master also directed that there be a costs management hearing.

The proposed costs management hearing was much delayed as issues of disclosure required the court's attention, the claimant having alleged that the defendant had not fully complied with his obligations under the terms of the order made and a further order for production of business documents was made which was the subject of an unsuccessful application by the defendant seeking leave to appeal out of time; the hearing was finally listed to be heard 19 August 2016.

The claimant had originally instructed solicitors who acted on his behalf until 26 May 2016 when the claimant filed notice of acting in person with representation from Mr Machell QC (who had acted for him from the outset) through the Bar Public Access Scheme (Direct Access). The claimant also received assistance from a Jersey firm of lawyers and gave notice that he intended to obtain assistance from junior Counsel – Mr Mohamedbhai who was to be instructed by a Jersey Lawyer as Mr Mohamedbhai was not authorised under the Direct Access scheme.

The defendant had been ordered to pay the costs of the unsuccessful application for leave to appeal and it was necessary for the deputy master to consider the claimant's entitlement to the costs incurred obtaining assistance from the Jersey Lawyers – it was held that the services provided by a lawyer qualified in another jurisdiction did not constitute "legal services" for the purposes of CPR 46.5(3)(b) therefore the fees of the Jersey Lawyer relating to the application were not recoverable by the claimant **per** ***Agassi v Robinson (Inspector of Taxes No.2)*** [2005] EWCA Civ 1507.

The sums in dispute were £10 million though the claim form advised that damages were expected to be "in excess of £300,000. No application had been made for a direction that a costs management should not apply and when initial directions had been given by the court both parties had been represented. The defendant had been represented by solicitors throughout therefore it had always been necessary for the court to make a costs management order in respect of the defendant's costs.

At the hearing before the deputy master it was ordered that the parties provide costs budgets, and in accordance with the order, the claimant provided a budget 5 August 2016 which was substantially in the form of Appendix H which, as directed by the deputy judge, dealt only with estimated costs. In the assumption section of the budget included the statement that the costs did not include any costs incurred prior to 7 July 2016 and included the costs of the Jersey lawyers on the basis that the

decision to exclude the same was to be appealed, the Jersey lawyer having land in Wales (although the claimant would remain as a litigant in person).

Each phase of the claimant's budget referred to hourly rates of £19.00 for the claimant in person, £415.00 for the Jersey lawyer and referred to fees of both Leading Counsel and Mr Mohamedbhai.

At the costs management hearing before the Chief Master, detailed consideration was given to the issue of costs management and litigants in person with Master Marsh stating that the starting point is CPR 3.12 (2) which gives an explanation for the purpose of costs management:

"*The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective.*"

The master refers to the objective being expressed in general terms and to no indication being given that a claim involving one or more litigants in person could not benefit from costs management.

At paragraph 18 of the master's judgment the master explains that the budgets in CPR 3.13 exclude litigants in person, "because the majority of cases in which litigants in person appear will not require the litigant in person's costs to be managed. But a litigant in person may opt to serve and file a budget. Indeed in a case in which a litigant in person is likely to be seeking a substantial costs order, whether because there will be fees of counsel under the Direct Access scheme or otherwise, it may well be desirable to do so".

He went on to find:

CPR 3.13 expressly exempts litigant in persons from the requirement to file and serve a budget, but "the editors of the White Book 2016 suggest that in spite of this exemption, it is open to a litigant in person to file and exchange a budget if they wish". Further, CPR 3.15(2) provided that the court could manage the costs to be incurred "by any party" and thereafter control the budgets. "Unlike CPR 3.13, no indication is given that different provisions apply to litigants in person," the judge said.

In addition, the Chief Master added, there was nothing in Practice Direction 3E that precluded a costs management order against a litigant in person.

At the costs management hearing before the Chief Master no issue was raised regarding the time sought by the claimant or to the fees of Leading Counsel instructed under the Direct Access scheme.

At the hearing the claimant sought a declaration that the cost of Jersey solicitors from whom he intended to seek advice, but not instruct to have conduct of the case, would be recoverable, along with the fees of junior Counsel said solicitors would instruct.

The claimant's request was opposed by defendant's counsel however the Chief Master gave the declarations as requested and later provided reasons in his judgment that was handed down.

The Chief Master held there was no reason, "*to construe CPR 46.5(3) narrowly so as to prevent a litigant in person recovering the cost of assistance in the course of their conducting the claim. The Direct Access scheme, whether it is used for advocacy or other assistance, provides a litigant in person with expertise which may be essential to be able to progress a claim in an orderly manner and is likely to be of assistance to the court for that reason. Similarly, it is clearly contemplated that a*

litigant in person may pay for and recover the cost of 'legal services' relating to the conduct of the proceedings. In a complex claim, the litigant in person may wish, for example, to obtain assistance with disclosure or the drafting of witness statements. This is part of the unbundling of legal services contemplated by Lord Woolf."

The Chief Master considered the evidential basis for the declarations sought was adequate particularly given the Jersey Lawyer having a practising certificate. He considered that the budgets set out clearly the basis upon which the claimant intended to conduct the litigation which included obtaining legal services from the Jersey lawyer and junior counsel noting that in neither case "will they be conducting the litigation" leaving the claimant as a litigant in person.

In the judgment Chief Master Marsh concluded it was right to grant the declarations sought and not to leave the issues to the trial judge or to a detailed assessment.