CIVIL PROCEDURE NEWS

Issue 7/2017 07 July 2017

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In Brief

Cases

■ **Darini v Markerstudy Group** (2017, Claim No. A49YP380) (County Court sitting at Central London), 24 April 2017, unrep. (HHJ Dight)

Qualified one-way costs shifting – notice of discontinuance – set-off

CPR rr.38.6(1), 44.12, 44.13(1)(a), 44.14, 44.15, 44.16. A personal injury claim arising from a road traffic accident was issued out of time on 14 October 2014; the accident having occurred on 4 October 2011 and despite the claim form being delivered to the court on 19 September 2014. The claim was served in February 2015. Notice of discontinuance was served by the claimants on 26 June 2015. The defendants applied to strike out the notice of discontinuance and for the claim to be struck out with a finding being made that it was "fundamentally dishonest". The defendants' application was dismissed. As a personal injury claim it was subject to qualified one-way costs shifting (QOCS) (CPR r.44.13(1)(a)). Due to the notice of discontinuance a deemed costs order was made in the defendant's favour (CPR r.38.6(1)). As a consequence of dismissing the defendant's set aside application, the defendant was ordered to pay the claimants' costs of the application, summarily assessed at £4,118.20. The judge further ordered that those costs payable by the defendant be set-off against the deemed costs order that had been made in the defendant's favour, thus reducing the amount payable under the deemed costs order. The judge then ordered the balance not to be enforced. As HHJ Dight summarised the position at para.1:

> *"The effect of the order was that the claimants had an entitlement to the costs of the unsuccessful application which they had defeated, but that, unlike the usual QOCS situation, the defendant does not actually have to pay them because those costs were to be set off against the costs which the defendant was entitled to by virtue of the notice of discontinuance, which the claimants would not ordinarily have to pay."*

The claimant appealed on two grounds: (i) there was no power to set-off in this situation; and (ii) if there was such power, it ought not to have been exercised as it was unjust to do so. There was no authority on the issue, which HHJ Dight noted was a point of general importance (and by implication suitable for a second appeal). **Held**, (i) set-off of costs against costs is a discretionary measure which may only be withheld from the court by specific rules of law, see ***Burkett v London Borough of Hammersmith and Fulham*** (2004) and ***Lockley v National Blood Transfusion Service*** (1992); (ii) the provisions relating to QOCS in section 2 of CPR Pt 44 form a self-contained code. CPR Pts 14, 15 and 16 limit the power to set-off and the court's discretion per CPR r.44.12; ***Vava v Anglo American South Africa Ltd*** (2013) relied on. As a consequence, HHJ Dight concluded there were only three situations where set-off could take place where QOCS applied, see para.24:

> *"[24] There are, therefore, in my judgment, three situations, on a proper construction of the rules, in which a set-off can take place: first, where a costs order is made against the claimant, it can be set off against damages and interest only; secondly, where the claimant's claim has been struck out on the grounds that it is an abuse, enforcement, including set-off, may be allowed in full without the permission of the court; and thirdly, where there is a finding on the balance of probabilities that a claimant is fundamentally dishonest, the courts may allow set-off to the full extent, but that is a matter of the court's discretion. Those three analyses accord, in my judgment, with the policy objective of protecting a claimant in personal injury claims. The facts of the present case do not satisfy any of the three situations. Sub-rules 15 and 16 simply do not come into play, and this was not a case where the learned district judge was seeking to set off costs against damages and interest; rather, she was seeking to set off costs against costs. She had, in my judgment, therefore, no jurisdiction; the criteria were not satisfied. Even if she had a general jurisdiction under CPR 44.12, and bearing in mind that an appellate court can only overturn an exercise of discretion of a lower court where the lower court has acted in a way which no judge properly directing himself on the law could have exercised such discretion, I would nevertheless have overturned her decision for the reasons given by the claimant [cited at para.11 of HHJ Dight's judgment]."*

In essence, the reason HHJ Dight accepted for allowing the set-off order to be over-turned, in the event that there was a discretion to order it, was that its result was unjust because it denied the claimants their costs of the defendant's failed application. The set-off as such therefore undermined the court's primary costs order in favour of the claimants in respect of that failed application. It left the claimants having to pay their own costs when they ought properly to have been placed in the position they would have been in if the defendants had not made their strike out application. ***Lockley v National Blood Transfusion Service*** [1992] 1 W.L.R. 492, CA, ***Burkett v London Borough of Hammersmith***

and Fulham [2004] EWCA Civ 1342; [2005] C.P. Rep. 11, CA ***Vava v Anglo American South Africa Ltd*** [2013] EWHC 2326 (QB); [2013] 5 Costs L.R. 805, QBD, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at paras 44.12.1, 44.17.1.)

■ **J C & A Solicitors Ltd v Andeen Iqbal** [2017] EWCA Civ 355, 16 May 2017, unrep. (Macfarlane, Briggs, Flaux LJJ)

RTA Protocol – irrecoverability of fixed costs

Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (the RTA Protocol) (as it was prior to 2013). Three road traffic accident (RTA) claims commenced under the RTA Protocol as it was prior to 2013. The defendants' insurers admitted liability in each case and paid the claimants RTA Protocol Stage 1 fixed costs. The claims however became statute-barred as the claimants failed to progress the claims further. The defendant insurers thereafter sought to recover the RTA Protocol Stage 1 fixed costs through proceedings on the small claims track. **Held**, there is no basis to order the repayment of Stage 1 fixed costs where a claimant fails to take further steps under Stage 2 of the pre-2013 RTA Protocol. The aim of the Protocol, which was carefully drafted and negotiated by the various stakeholder groups, was to ensure that a claimant's legal representatives received fixed cost payments at the end of each stage of the Protocol procedure. Payment was due irrespective of what happened, or not, at any further stage of the process: each stage was in terms of costs a discrete process. Such payments are not interim payments on account. The RTA Protocol was designed to ensure that parties avoided legal proceedings and to promote certainty and proportionality in litigation, to hold that its Stage fixed costs were capable of recovery would undermine those aims. ***Nizami v Butt*** [2006] EWHC 159 (QB); [2006] 1 W.L.R. 3307, QBD, ***Lamont v Burton*** [2007] EWCA Civ 429; [2007] 1 W.L.R. 2814, CA, ***Kilby v Gawith*** [2008] EWCA Civ 812; [2009] 1 W.L.R. 853, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1, para.45.9.1.)

■ **Cameron v Hussain** [2017] EWCA Civ 366, 23 May 2017, unrep. (Gloster VP, Lloyd-Jones LJ, Sir Ross Cranston)

Party to proceedings – whether required to be named

Road Traffic Act 1988, s.151, CPR PD7A para.4.1(3), PD16 para.2.6(a), r.19.2, PD19A paras 1, 3. Proceedings were issued in respect of a road traffic accident. The vehicle which collided with the claimant's car failed to stop after the accident, but was traced via its registration number. The vehicle's owner failed to inform the claimant who was driving his car at the time of the accident. It also became apparent that the vehicle was not properly insured. The claim for damages was brought against the vehicle's owner. That claim was dismissed via summary judgment on the basis that the claimant could not prove that the vehicle's owner was the driver at the time of the accident. A cross-application by the claimant to amend the claim in order to substitute an unnamed defendant, identified by description only, for the vehicle's owner was refused. An appeal from that refusal was dismissed. On appeal to the Court of Appeal, it was **held** that it was permissible for an unnamed defendant to be identified on a claim form via description where a judgment for damages could be obtained if the claim succeeded. Whether the court exercised its discretion to permit a claim to be issued against an unnamed defendant was to be determined consistently with CPR r.1.1 i.e., whether or not such an approach further the overriding objective: Morritt VC's dicta from ***Bloomsbury Publishing Group v News Group Newspapers*** (2003) followed. As Gloster VP put it at paras 53 and 54:

> *"[53]. I agree with Sir Andrew Morritt V-C that there is no reason in principle why, in appropriate cases, it should not be permissible under the CPR for a claimant to bring proceedings against an unnamed defendant, suitably identified by an appropriate description. The fact that the CPR may make express provision for situations in which this can take place does not preclude orders being made against unnamed defendants in other circumstances. Likewise, I see no reason in principle, or as a matter of construction of the rules, why the ability to do so should be limited to a claim for an injunction or in relation to future relief. Although there was no express discussion of the issue as to whether it was appropriate to bring a claim for damages against an unnamed person in the defamation cases, the logic of Sir Andrew Morritt's analysis, in my judgment, equally applies to a claim for damages. The Canadian authorities demonstrate that it is well-established that damages claims may be issued against unnamed defendants. For example, in Manson v John Doe [2013] ONSC 628 damages of $200,000 were awarded against an anonymous person waging a campaign of defamation via websites. In such a case there is every reason for such an order to be made.*
>
> *[54]. As Sir Andrew Morritt V-C pointed out, the question is not simply whether a claimant can issue proceedings against a person unknown, notwithstanding the direction in the rules that a defendant "should" be named, or whether the court can permit a party to amend the claim form to substitute an unnamed defendant for a named defendant. The question also arises whether, in any particular case, the court should in the exercise of its discretion permit a claimant to amend in order to substitute an unnamed defendant, or permit such an action to proceed, so as to lead to a judgment against him. Once it is accepted that proceedings can be brought against*

unnamed defendants, then whether in any particular case that should occur, or whether relief should be granted against such defendants, must, it seems to me, depend on whether the overriding objective (that is to say of deciding cases justly and at proportionate cost – see CPR r.1.1) would be furthered by such a course."

In the present case, a proper description would have included reference to the specific vehicle involved in the accident, the date, time and place of the accident. The appeal was allowed and substitution effected. ***Bloomsbury Publishing Group v News Group Newspapers*** [2003] EWHC 1206 (Ch); [2003] 1 W.L.R. 1633, ChD, ***Stone v WXY*** [2012] EWHC 3184 (QB), unrep., QBD ***Brett Wilson LLP v Persons Unknown*** [2015] EWHC 2628 (QB); [2016] 4 W.L.R. 69, QBD, ***Smith v Unknown Defendant Pseudonym 'Likeicare'*** [2016] EWHC 1775 (QB), unrep., QBD, ref'd to. (See ***Civil Procedure 2017*** Vol.1, para.7APD4.)

■ **Hyde v Milton Keynes NHS Foundation Trust** [2017] EWCA Civ 399, 23 May 2017, unrep. (Davis, Lewison, McCombe LJJ)

Conditional Fee Agreement – relationship to public funding – recoverability

Access to Justice Act 1999, ss.10(1), 22(2), Community Legal Services (Costs) Regulations 2000, regulation 4. The claimant commenced a personal injury claim in 2012 arising from the defendant's alleged clinical negligence. At that time, her claim was funded by legal aid. Liability was admitted shortly before the claim was issued. Quantum remained in issue. Legal aid funding was however expressly limited in terms of its scope. It was also subject to financial limitations. Work carried out outside those limitations was unfunded. Furthermore, the total public funding available was subject to an upper threshold and application would need to be made to amend the public funding certificate if it was likely to be exceeded. At various times the financial limitations were amended. However, a request to increase the financial limits regarding expert evidence was refused by the Legal Services Commission in November 2012. Additionally, the claimant's solicitors concluded that further work needed to be carried out regarding quantum that would go beyond the financial thresholds. To secure further funding, conditional fee agreements, with success fee, were entered into in March 2013 prior to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 coming into force. Public funding did however remain in place. The claim thereafter settled and an issue arose whether the claimant could recover her costs, and specifically the CFA success fee and related ATE insurance premium. The defendant argued that the costs arising in relation to the CFA were irrecoverable due to the effect of s.10(1) and s.22(2) of the Access to Justice Act 1999; those provisions barring lawyers "*from 'topping up' fees by payments under a private retainer at a time when the client is also publicly funded*"; see ***Merrick v Law Society*** (2007) per Gross J at para.54. Furthermore, irrespective of whether there was "topping up", the prohibition in the 1999 Act, it was argued, rendered any private retainer irrecoverable where a public funding certificate remained in place. The CFA, it was thus said, was unenforceable as the public funding certificate was not discharged prior to it being entered into. Given this it was argued the claimant and her solicitors continued to conduct the litigation under the public funding certificate even if they wrongly believed, and intended that, the litigation was to be conducted under both public funding and a CFA. The Costs Master rejected the argument that the CFA was unenforceable. An appeal from that decision was dismissed. The Court of Appeal dismissed a further appeal. **Held**, while there was a general prohibition on "topping up": (i) the 1999 Act did not preclude a party from entering into funding arrangements additional to public funding, which covered work not covered by that funding. It prohibited private funding on a concurrent basis to public funding. The CFA funding in this case was additional to and not concurrent with the public funding as it concerned funding for matters and work done outside the financial limits of that public funding; (ii) s.22(1)(a) of the 1999 Act specifically retains per Davis LJ at para.29 "*the right of the publicly funded litigant to enter into a private retainer with his or her solicitors. Nothing in the Regulations precludes that, as between solicitor and client. It follows that, as between solicitor and client, there is no proper basis for concluding that the new contractual relationship so arising becomes unlawful*". The parties in this case entered a private retainer, funded via the CFA, to provide services other than those being funded under public funding; (iii) there was nothing in the wording of either s.10(1) or s.22(2) of the 1999 Act that required a public funding certificate to be discharged before a solicitor and client could enter into a private retainer. Furthermore, as Davis LJ stressed at para.30:

". . . it was inherent in the making of the CFA that it indeed from its commencement entirely superseded the public funding for the services being provided and precluded the solicitors from claiming on the LSC for such services so provided. By reference to the statutory scheme I also can see nothing to suggest that a conclusion, in the circumstances of this case, that the CFA was valid and enforceable would be harmful to the integrity of the legal aid scheme or to the integrity of the legal system (to adapt the words of Lord Toulson in Patel v Mirza [2016] 3 W.L.R. 399], [2016] UKSC 42): to the contrary"

Additionally, it was established by authority that private retainers are enforceable if entered into prior to the formal discharge of a public funding certificate: ***Littaur v Steggles Palmer*** (1986), which Davis LJ stated, at para.34, to be authority for:

"the general proposition that, on appropriate facts, fees may be recovered under a private retainer notwithstanding that a funding certificate has not been formally discharged, where the scope of the work sanctioned by the public funding certificate has been completed. It was not suggested to us that the position is any different under the subsequent statutory scheme."

While a formal discharge of a public funding certificate is beneficial and generally desirable for reasons of clarity and certainty, to focus on its discharge or not as determinative of the issue of enforceability or recoverability of an additional private retainer would be to elevate form over substance. In the present case, even though the public funding certificate had not been discharged, the CFA – as a matter of reality and substance – replaced the prior public funding. It superseded it and was designed and understood to do so. Davis LJ went on to consider how difficulties might arise in determining the date at which a private retainer may supersede public funding where there is no formal discharge. He noted that an appropriate date would, ordinarily, be the date at which the opposing party is notified of the change. However, it would not be advisable for the court to take an inflexible or prescriptive approach to this question, which ought to be determined by "requirements of justice and fairness" on the facts of specific cases. In the present case, the private retainer was entered into on 25 March 2013, notice of change of funding sent to the opposing party on 26 March and received on 27 March. In those circumstances, there was no possibility of the public and private funding to have operated concurrently such as to render the CFA unenforceable. ***Littaur v Steggles Palmer*** [1986] 1 W.L.R. 287, CA, ***Turner v Plasplugs Ltd*** [1996] 2 All E.R. 939, CA, ***Burridge v Stafford*** [2000] 1 W.L.R. 927, CA, ***Merrick v Law Society*** [2007] EWHC 2997 (Admin), unrep., Admin, ***Mohammadi v Shellpoint Trustees Ltd*** [2009] EWHC 1098 (Ch); [2010] 1 All E.R. 433, ChD, ***Rayner v Lord Chancellor*** [2015] EWCA Civ 1124; [2015] 6 Costs L.R. 957, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.2, para.9A-823+.)

■ **Emmanuel v Revenue & Customs** [2017] EWHC 1253 (Ch), 26 May 2017, unrep. (HHJ Walden-Smith)

Party co-operation – extension of time

CPR r.1.3. In May 2014 Her Majesty's Revenue & Customs (HMRC) attempted to serve a statutory demand on the appellant. Service was served by way of posting the statutory demand through the letter box of a property. HMRC believed the appellant lived at the property. It had previously attempted and been unable to effect personal service of the statutory demand. In July 2014 HMRC served a bankruptcy petition on the appellant. Again, personal service could not be effected. Permission was granted to serve the petition by way of substituted service at the address where the statutory demand was served. The appellant was made bankrupt in December 2014, after which various attempts were made to proceed with a public examination of the appellant. Following two public examinations the appellant, in September 2015, applied to annul the bankruptcy order. He did so on a number of grounds, including that he had not been served with the statutory demand or the bankruptcy petition. The application to annul was dismissed by the Registrar in May 2016. An appeal from that dismissal and the costs order made by the Registrar was itself dismissed by HHJ Walden-Smith. Prior to the hearing before the Registrar, the appellant filed evidence on which he wished to rely at the annulment hearing. HMRC was directed to file its evidence in response by 21 March 2016. HMRC attempted to agree an extension of time for service of that evidence in response with the appellant. Its request was refused. In dealing with the appeal from the Registrar's costs order HHJ Walden-Smith **held** that the appellant ought to have agreed to HMRC's request, made in advance of the deadline for service, for a short extension of time. As such the appellant was rightly subject to the cost consequences that flowed from the refusal. In reaching this decision the judge stressed that the appellant's refusal to consent, which was not made until shortly prior to the deadline for service expired, was apparently based on an attempt to obtain a tactical advantage: it was contrary to the overriding objective. The approach identified by Jackson LJ in ***Hallam Estates Ltd v Baker*** (2014) at para.12 was, and ought to be, followed. As Jackson LJ put it,

". . . A variety of circumstances may arise in which one or other party (however diligent) may require a modest extension of time. Under rule 1.3 the parties have a duty to help the court in furthering the overriding objective. The overriding objective includes allotting an appropriate share of the court's resources to an individual case. Therefore legal representatives are not in breach of any duty to their client, when they agree to a reasonable extension of time which neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation. On the contrary, by avoiding the need for a contested application they are furthering the overriding objective and also saving costs for the benefit of their own client."

(Albeit not referred to in HHJ Walden-Smith's judgment, also see ***Denton v TH White Ltd*** [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926 at para.43.) ***Regional Collection Services Ltd v Heald*** [2000] B.P.I.R. 661, CA, ***Leicester v Plumtree Farms Ltd*** [2003] EWHC 206 (Ch); [2004] B.P.I.R. 296, ChD, ***Yang v Official Receiver*** [2013] EWHC 3577 (Ch); [2014] B.P.I.R. 826, ChD, ***Hallam Estates Ltd v Baker*** [2014] EWCA Civ 661; [2014] C.P. Rep. 38, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.3.1.2.)

■ **Select Car Rentals (North West) Ltd v Esure Services Ltd** [2017] EWHC 1434 (QB), 19 June 2017, unrep. (Turner J)

Third party costs orders – qualified one-way costs shifting

Senior Courts Act 1981, s.51, CPR rr.44, 46, PD44 paras 12.2 and 12.5. Four claimants brought a claim for personal injuries and other damages said to have arisen from a road traffic accident in 2013. The defendant insurance company defended the claims alleging fraud. The claims were dismissed although the trial judge did not find they were fraudulent, albeit they were stated to be "very suspicious". An issue arose as to costs. The claimants were protected from an adverse costs order, subject to CPR Pt 44, due to the operation of qualified one-way costs shifting (QOCS). The defendant insurer sought to recover its costs from a non-party, Select Car Rentals (North West) Ltd (Select) which had provided replacement cars following the alleged accident and for which recovery of significant hire charges had been included in the claimants' claim. The trial judge awarded the defendant 60% of its costs against Select. An appeal from that costs order was dismissed by Turner J. In so doing he noted that the modern approach to the exercise of discretion to impose a costs order against a non-party, under Senior Courts Act 1981, s.1 and CPR r.46.2, is set out in the Privy Council decision in ***Dymocks Franchise Systems (NSW) Pty Ltd v Todd*** (2004): see the discussion in ***Deutsche Bank v Sebastian Holdings*** (2016) at paras 17 et seq and particularly its emphasis on the fact that such orders are: (i) exceptional "*in the sense that [such an order is] outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense*"; and (ii) that when such an order is sought ". . . *the critical factor in each case is the nature and degree of his connection with the proceedings*. . ."; and (iii) that the discretion to make such an order is one that should be "*exercised justly*". In dealing with the question whether to impose such a non-party costs order Turner J had to resolve a question concerning the relationship between CPR r.44.16 and CPR r.46.2. CPR r.44.16, which makes provision for exceptions to the QOCS regime, provides that:

> "(1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.
>
> *(2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where –*
>
> *(a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or*
>
> *(b) a claim is made for the benefit of the claimant other than a claim to which this Section applies.*
>
> *(3) Where paragraph (2)(a) applies, the court may, subject to rule 46.2, make an order for costs against a person, other than the claimant, for whose financial benefit the whole or part of the claim was made."*

CPR r.46.2 provides that

> *"(1) Where the court is considering whether to exercise its power under section 51 of the Senior Courts Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings, that person must –*
>
> *(a) be added as a party to the proceedings for the purposes of costs only; and*
>
> *(b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further. . ."*

As Turner J noted CPR r.46.2 makes no provision concerning the nature or content of the discretion provided for in Senior Courts Act 1981, s.51. It was further noted that CPR PD44 para.12.5 provides that

> *"The court has power to make an order for costs against a person other than the claimant under section 51(3) of the Senior Courts Act 1981 and rule 46.2. In a case to which rule 44.16(2)(a) applies (claims for the benefit of others) –*
>
> *(a) the court will usually order any person other than the claimant for whose financial benefit such a claim was made to pay all the costs of the proceedings or the costs attributable to the issues to which rule 44.16(2)(a) applies, or may exceptionally make such an order permitting the enforcement of such an order for costs against the claimant.*
>
> *(b) the court may, as it thinks fair and just, determine the costs attributable to claims for the financial benefit of persons other than the claimant."*

The specific question that Turner J had to resolve was whether CPR r.44.16(3) and PD44 para.12.5 had created a new, broader, category of discretion to make a non-party costs award. Turner J **held** that the two provisions did not do so, see para.29:

". . . I reject Esure's submission that CPR 44.16 operates in a way which is distinct from older case law. The suggestion that it has effectively created a new category of discretion to be exercised in a conceptually different way is unattractive. Esure argue that there should be a different and broader discretion to award costs in the context of credit hirers operating behind the protecting veil of the QOCS regime. It may well be that, as is often the case, where a credit hire company promotes litigation for its own financial benefit, knowing that the party in whose name the claim is brought will enjoy some level of protection under the QOCS regime or will probably not be able to satisfy any adverse costs order in any event, then this is a factor which the court may take into account when considering whether it is just for the credit hire company to pay costs. It will be noted, however, that even claimants otherwise protected under QOCS are not entirely immune from the enforcement of an order against them under CPR 44.16 even though it will usually be the case that it is the relevant non-party who has sought a financial benefit who will be first in line. Thus the CPR 44.16 does not change the nature of the discretion but merely operates in circumstances in which factors in favour of the exercise of that discretion may well come into play. Indeed, since the essence of the common law discretion as explained in Deutsche Bank is to achieve what is just on the facts of each case then this approach is sufficiently flexible to bring Occam's razor into play and obviate the need to create a parallel discretion of a different type in cases falling within the ambit of the QOCS regime."

In reaching this decision Turner J agreed, at para.30, with the analysis set out in *Cook on Costs 2017* at its para.40.22 viz.,

"The question that inevitably arises is whether the jurisdiction under CPR 44.16(3) adds anything to the existing provisions for costs against non-parties. The fact that the rule makers have chosen to include this separate provision, suggests that the answer is yes, otherwise why include anything at all? However, the express references to CPR 46.2 in CPR 44.16(3) itself and to s 51(3) and CPR 46.2 in the PD, the overarching statutory jurisdiction in respect of costs in s 51(3) and the absence of any other defined criteria by which the court may determine applications under CPR 44.16(3), suggest that the rule is superfluous, other than a) by way of identifying specific categories of non-party in the firing line and b) as a reminder to parties and the court of the availability of a non-party costs order. As attention seems to be turning to the QOCS provisions, it may be that authority on this provision will emerge."

Further, Turner J rejected an argument that CPR PD44 para.12.2 was ultra vires. ***Aiden Shipping v Interbulk*** [1986] A.C. 965, HL, ***Symphony Group v Hodgson*** [1994] Q.B. 179, CA, ***Dymocks Franchise Systems (NSW) Pty Ltd v Todd*** [2004] 1 W.L.R. 2807, PC, ***Deutsche Bank v Sebastian Holdings*** [2016] EWCA Civ 23; [2016] 4 W.L.R. 17, CA, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at paras 46.2.2, 44.16.)

■ **Interactive Technology Corporation Ltd v Ferster** [2017] EWHC 1510 (Ch), 22 June 2017, unrep. (Morgan J)

Part 36 Offer – court's approach following disclosure of existence of offer

CPR r.36.16. In a long-running shareholder dispute between three brothers, the claimant company sought its costs arising from its claim against the defendants. The defendants had made three CPR Pt 36 offers in respect of the claimant's claim against them. A number of issues in dispute between the parties were determined by the court at a hearing in November 2016. Other issues remained to be determined. The court was made aware of the fact, but not the content, of the three Pt 36 offers (per CPR r.36.16(4)(a) and (b)). The parties did not agree to the disclosure of the content of the offers to the court (see CPR r.36.16(3)(c)). Given that a number of issues remained undetermined the case had not been decided for the purposes of CPR r.36.16(2), ***Beasley v Alexander*** (2013) applied. The claim did not however fall within the exception to r.36.16(2) provided for by r.36.13(3) as, although it did fall within r.36.16(4)(d)(i) (as issues in the claim had been decided), the offers related to issues that had not been decided; it thus did not satisfy the condition set out in r.36.16(4)(d)(ii). In the circumstances the court had to approach the question of costs on the basis that the Pt 36 Offers related to undecided issues. The question before the court was therefore what approach to take to the claimant's application for costs in the light of its knowledge of the offers and that they, at the least, may relate to the undecided issues. **Held**, costs were reserved. In reaching that decision Morgan J relied on the approach taken in ***HSS Group plc v BMB Ltd*** (2005), where following the conclusion of a trial on liability the Court of Appeal held that where the trial on damages was to follow, in anything other than an exceptional case, costs of the trial on liability should be reserved pending the determination of the quantum trial. It was held in that case to be wrong in principle to hold, as the trial judge had, that the Pt 36 Offer was not relevant to the costs of the liability trial. He further distinguished the case where, as noted in ***Civil Procedure 2017*** Vol.1 at para.36.6.1, a Pt 36 Offer relates to issues decided and another made by the same party relates to issues yet to be decided. That was not the present situation. Nor was this a situation where separate Pt 36 Offers had been made in respect of liability and quantum. Further arguments based on the terms of the Pt 36 Offers were also rejected as the court could not and did not know what the terms were. Additionally, an argument based on CPR r.36.17 was not ruled on, although Morgan J's provisional view was that that rule did not justify departing from his decision to reserve costs. ***HSS Group plc v BMB Ltd*** [2005] 1 W.L.R. 3158, CA, ***Beasley v Alexander*** [2012] EWHC 2715 (QB); [2013] 1 W.L.R. 762, QBD, ref'd to. (See ***Civil Procedure 2017*** Vol.1 at para.36.16.1.)

Practice Updates

PRACTICE GUIDANCE

PRACTICE NOTE – QUEEN'S BENCH DIVISION TRIAL LISTING

On 13 June 2017 Foskett J and Senior Master Fontaine issued a Practice Note concerning revisions to Queen's Bench Division Listing arrangements. The new arrangements **came into force** on **19 June 2017** and apply to listing trials before High Court judges in London. Listing arrangements are now to be the responsibility of the Queen's Bench Judges Listing Office. The changes have resulted in amendments to be made to the following forms: PF52 and PF52A, new versions of which are now available for use by practitioners. The Practice Note is reproduced below.

PRACTICE NOTE

QUEEN'S BENCH DIVISION

OF THE HIGH COURT IN LONDON

CHANGES TO THE PROCEDURE FOR OBTAINING TRIAL LISTING APPOINTMENTSWITH THE QB JUDGES LISTING OFFICE

1. *This note is intended to provide guidance for practitioners about the new arrangements coming into effect from 19 June 2017 for issuing Listing appointments for trial before judges of the High Court in London.*
2. *The Queen's Bench Judges Listing Office (QBJL) are to take over responsibility for setting trial listing appointments when the listing directions are made, usually by the assigned QB Master. Instead of the claimant applying for a listing appointment, the Queen's Bench Masters Listing Section (QBML) will send a copy of the sealed order giving the listing directions direct to QBJL when it sends the sealed order to the parties. QBJL will then send a listing appointment to the parties.*
3. *This change in procedure has resulted in an amendment to the model directions in Forms PF52 and PF52A (the latter for claims in the Mesothelioma List) and PF53, (giving directions for separate trial of an issue).*

   Paragraph 22 of PF52 and Paragraph 4 (b) (ii) of PF53 now read as follows:

   > *"A copy of this sealed order will be sent to the Queen's Bench Judges Listing Office who will notify all parties of a listing appointment for a trial date or period within the trial window, which will usually be six weeks from the date the order is sealed. If parties have any queries in relation to the listing appointment they should contact Queen's Bench Judges Listing on qbjudgeslistingoffice@hmcts.gsi.gov.uk"*

   Paragraph 12(1) (b) of PF52A as follows:

   > *"A copy of this sealed order will be sent to the Queen's Bench Judges Listing Office who will notify all parties of a listing appointment for a trial date or period within the trial window, which will usually be three weeks from the date the order is sealed. If parties have any queries in relation to the listing appointment they should contact Queen's Bench Judges Listing on qbjudgeslistingoffice@hmcts.gsi.gov.uk"*

   (The only difference being the shorter timescale for providing a listing appointment for mesothelioma trials (where liability is in issue) which need to be listed urgently.)
4. *It is intended that this change in procedure will reduce the in-built delay in requiring the claimant/parties to obtain a listing appointment and the problems that occur when the claimant/parties fail to obtain a listing appointment by the date specified. It will also provide more control over listing appointments by QBJL and allow greater flexibility in listing trial dates.*
5. *Parties are requested to use the amended wording in PF52 and PF52A when providing draft directions orders with Directions questionnaires and for Costs and Case Management Conferences.*
6. *Trial Listing arrangements before QB Masters will continue to be arranged by the QBML qbmasterslisting@hmcts.gsi.gov.uk.*

The Honourable Mr Justice Foskett and the Senior Master
13 June 2017

In Detail

FROM *MERRIX v HEART OF ENGLAND NHS FOUNDATION TRUST* [2016] EWHC B28 (QB) AND [2017] EWHC 346 (QB) TO *HARRISON V UNIVERSITY HOSPITALS COVENTRY AND WARWICKSHIRE NHS TRUST* [2017] EWCA Civ 792, INCURRED COSTS, BUDGETED COSTS, CPR r.3.18 AND ASSESSMENTS

The debate

The February edition of Civil Procedure News (2/2017) contained an article (**In Detail *MERRIX v HEART OF ENGLAND NHS FOUNDATION TRUST* [2016] EWHC B28 (QB) – BUDGETED COSTS, CPR r.3.18 AND ASSESSMENTS)** that considered the competing arguments on the interplay between a costs management order and a subsequent assessment, and, in particular the effect of the then CPR r.3.18, which provided:

> *"3.18 In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –*
>
> *(a) have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and*
>
> *(b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so."*

The conclusion reached was "*that a straightforward interpretation of the relevant rules linking the combination of the unambiguous wording of CPR r.3.18 (being a specific rule determining the link between costs management and assessment) and the unequivocal directive that is CPR r.44.4(2), points to a clear and obvious outcome: that on an assessment of costs (whether summary or detailed) on the standard basis the court cannot depart from the last agreed or approved budget unless there is good reason. In other words, CPR r.3.18 means no more nor no less than it says.*"

This was followed in the March edition (3/2017) by the report of ***Merrix v Heart of England NHS Foundation Trust*** [2017] EWHC 346 (QB); [2017] 1 Costs L.R. 91. In that case the court considered, as a preliminary issue, this very interplay between the costs management regime under Section II of CPR 3 and subsequent detailed assessment. The preliminary issue took the form of answering the following question:

> *"To what extent, if at all, does the costs budgeting regime under CPR Part 3 fetter the powers and discretion of the costs judge at a detailed assessment of costs under CPR Part 47?"*

At first instance (***Merrix v Heart of England NHS Foundation Trust*** [2016] EWHC B28 (QB)), the Regional Costs Judge, concluded that:

- a budget was neither a cap nor a fixed sum, but instead an available fund;
- a departure from the budget under CPR 3.18(b) could only be to something outside the budget (in other words, adopting his definition of budget, to a sum in excess of the budget).
- there should still be a "conventional" item by item assessment of the budgeted costs; and
- the receiving party should recover the lower of the budgeted costs or the sum assessed on an item by item assessment of the work for which costs had been budgeted;

His response to the actual question posed, was "*that the powers and discretion of a costs judge on detailed assessment are not fettered by the costs budgeting regime save that the budgeted figures should not be exceeded unless good reason can be shown.*"

In allowing the appeal against this decision, Carr J gave this answer to the same question:

> *"Where a costs management order has been made, when assessing costs on the standard basis, the costs judge will not depart from the receiving party's last approved or agreed budget unless satisfied that there is good reason to do so. This applies as much where the receiving party claims a sum equal to or less than the sums budgeted as where the receiving party seeks to recover more than the sums budgeted." Para.92*

In reaching this outcome, Carr J regarded the debate as to whether the budget is a fund or a fixed sum to be not "particularly instructive", preferring, instead, to rely upon the simple construction of CPR 3.18. She, too, regarded this as unambiguous, stating:

> *"The words are clear. The court will not – the words are mandatory - depart from the budget, absent good reason. On a detailed assessment on a standard basis, the costs judge is bound by the agreed or approved costs budget, unless there is good reason to depart from it. No distinction is made between the situation where it is claimed that budgeted figures are or are not to be exceeded. It is not possible to square the words of CPR 3.18 with the suggestion that the assessing costs judge may nevertheless depart from the budget without good reason and carry out a line by line assessment, merely using the budget as a guide or factor to be taken into account in the subsequent detailed assessment exercise." Para.67*

Recognising that her decision was unlikely to be the final word on the topic, and to avoid the piecemeal emergence of jurisprudence, Carr J suggested that the matter was ripe for early consideration by the Court of Appeal "*raising, as it does, an important point of principle or practice*". In ***Harrison v University Hospitals Coventry and Warwickshire NHS Trust*** [2017] EWCA Civ 792, the Court of Appeal has provided the definitive explanation sought of the link between the costs management regime and assessment.

The issues arising in *Harrison*

The appeal in ***Harrison*** raised three issues. The appeal had been leap-frogged to the Court of Appeal. This was because two of the three issues raised were of wider importance in the context of costs. It is on these, and not a discrete point as to which proportionality provision applied, that this article will focus, as both relate to the relationship between costs management and assessment, although only the first directly arises under the debate above. Davis LJ (one of the five Lord Justices originally designated to hear appeals on matters of procedure arising from the April 2013 Civil Justice reforms), giving the judgment with which both the Master of the Rolls and Black LJ agreed, articulated the two issues as follows:

- Where a Costs Management Order ("CMO") approving a costs budget has been made in the course of civil proceedings is a costs judge on a subsequent detailed assessment precluded from going below the budgeted amount unless satisfied that there is good reason for doing so? Or is there an entitlement to do so without any prior requirement of good reason for going below the budgeted amount?
- Whether, with regard to costs incurred prior to the budget ("incurred costs"), there is or is not a like requirement of good reason if a costs judge on a subsequent detailed assessment is to depart from the amount put forward at the relevant costs management hearing.

This article will refer to the first of these as "the *Merrix* point" and the second as "the *SARPD Oil* point"

The *Merrix* point

The Master had taken the same position as that subsequently adopted by Carr J on the appeal in *Merrix*, namely that CPR r.3.18 applied to any departure from the budgeted costs, upwards or downwards.

The Court of Appeal upheld the Master's decision on this point and approved the decision of Carr J expressly rejecting the appellant's arguments that:

- a budget is simply a fund
- an understanding of CPR r.3.18 had to reflect the "realities" of costs management for those who undertook the exercise at the "coal-face" of decision making in this discipline. Indeed Davis LJ, described this argument as coming "*close to an attack if not on the whole principle of costs budgeting then at all events on the efficacy in practice of costs budgeting*".

Instead, the court regarded the critical issue as being the actual wording of CPR r.3.18(b) and its proper construction. Davis LJ considered there to be no real ambiguity in the words used, finding their meaning to be clear. He rejected the suggestion that there was sufficient ambiguity to permit the court to adopt a purposive interpretation of the provision. The court described the words *"depart from"* as open-ended, more specifically not limited in application, as they could have been both easily and explicitly if that was the intention, only to situations where the costs exceeded the budgeted sum.

Accordingly, and unsurprisingly on a simple reading of CPR r.3.18, it is now settled that:

- the court does not undertake a "conventional" line by line assessment of budgeted costs
- any departure from the budgeted costs, whether upwards or downwards, can only be on the basis of there being a "good reason" to depart from the last approved or agreed budget.

The *SARPD Oil* point

It is important to stress that in April 2017 amendments were made to CPR r.3.15 and r.3.18 to permit a costs management order to be made in respect of any incurred costs that are agreed (r.3.15(2)(c)), from which there cannot be departure without good reason under r.3.18 and to allow comments on incurred costs (r.3.15(4)), which will be taken into account at any subsequent assessment (r.3.18(c)) – supplementing PD 3E.7.4, which already provided for this. These provisions did not apply in ***Harrison*** and so the comments in this article are based on the rules as they applied in this case.

The Master, influenced in part by comments made in ***SARPD Oil International Ltd v Addax Energy SA*** [2016] EWCA Civ 120, had found that incurred costs put forward in Precedent H had a "certain status" and that in "practical terms" good reason would be needed if there was to be a departure from those figures. Whilst it should be remembered that in *Harrison* the costs managing judge had not made any comments on the incurred costs and whilst Davis LJ described the comments in *SARPD Oil* as obiter, they were both forceful and unambiguous:

> *"For example, if a court has commented that incurred costs in a costs budget appear to be reasonable and proportionate, it would usually require good reason to be shown why such costs should not be included in an award of costs on the standard basis at the end of the trial. In such a case, the party who had put forward the costs budget would have been encouraged by the court to litigate on the understanding and with the legitimate expectation that such costs would be likely to be recovered if he were successful, and good reason would need to exist to justify defeating that expectation. Therefore, depending on what is said by the court by way of comment, the practical effect of a comment on already incurred costs made by a court pursuant to para.7.4 of PD3E may be similar to the effect under Part 3.18(b) of formal approval of the estimated costs element in a cost budget." Para.43*

Again, Davis LJ approached the issue solely on the basis of interpretation, giving the wording of the then provisions their natural and ordinary meaning. Allowing the appeal and reflecting the views of those who had found the comments in *SARPD Oil* difficult to reconcile with the references in the relevant provisions of CPR 3 to management of costs "to be incurred" (r.3.12(1) and r.3.15(1)), he concluded that the incurred costs did not come within the constraints of CPR r.3.18.

The future

At a time when costs management is now being embraced more warmly, perhaps because the prospect of extended fixed recoverable costs is perceived as the less attractive alternative, the decision in *Harrison* on the two points considered above (coupled with the April 2017 amendments to CPR r.3.15 and r.3.18 on the *SARPD Oil* point), is to be welcomed, even if the clarity which it provides does no more than confirm the position to be that to which a simple construction of CPR r.3.15, CPR r.3.18 and CPR PD 3E 7.4 had always seemed inexorably to lead.

However, the decision in *Harrison* identified two areas of the costs management regime for possible further consideration. These are:

- The decision deliberately, and understandably, left open the question of what might constitute "good reason" to depart from a budget. "Understandably", because Davis LJ recognised that "good reason" will be fact specific. However, he tendered this clear and necessary, if the costs management regime is to be purposeful, guidance to all involved in costs managing:

  "Costs judges should therefore be expected not to adopt a lax or over-indulgent approach to the need to find 'good reason': if only because to do so would tend to subvert one of the principal purposes of costs budgeting and thence the overriding objective."

- There have already been suggestions that the comments at para.52 of *Harrison* identify another area of contention. Commenting on the proportionality cross-check under CPR 44.3(2)(a), Davis LJ said:

  "I add that where, as here, a costs judge on detailed assessment will be assessing incurred costs in the usual way and also will be considering budgeted costs (and not departing from such budgeted costs in the absence of 'good reason') the costs judge ordinarily will still, as I see it, ultimately have to look at matters in the round and consider whether the resulting aggregate figure is proportionate..."

  That CPR 44.3(2)(a) requires the court at the end of an assessment to step back and undertake a cross check of the sum assessed to ensure that the sum bears a reasonable relationship to the factors at CPR r.44.3(5)(a)-(e) is uncontroversial. However, where part of the assessed sum represents budgeted costs, then as those have already been subjected to a proportionality determination at the time of setting the budget (under CPR PD 3E.7.3), prevailing wisdom was that if the CPR r.44.3(2)(a) cross-check revealed the sum assessed to be disproportionate,

the court could not reduce the costs to a level below that which the court had already concluded was proportionate at costs management (i.e. the total of the budgeted costs).

Some have taken the comments in para.52 to suggest that under CPR 44.3(2)(a), the court may, at the end of the assessment, determine an overall proportionality figure below the budgeted costs. This argument relies on there being no qualification in para.52 limiting any reduction to the budgeted costs, as opposed to a positive affirmation that 44.3(2)(a) permits the court to revisit the proportionality of budgeted costs. The contrary view is supported by a reading of the judgment as a whole. It is patently apparent that the court was astute to the fact that budgeted costs have already been subjected to a determination of proportionality –see paras 31-33, and, in particular, the comment at para.32 that:

"In this regard, it is also in my view particularly important overall to bear in mind that a judge who is being asked to approve a budget at a costs management hearing must take into account, in assessing each budgeted phase, considerations both of reasonableness and of proportionality."

Conclusion

Over four years since the introduction of CPR r.3 Section II, many procedural revisions later, with the clarity provided by the appellate decisions in *Merrix* and *Harrison* and with the alternative being wholescale fixed recoverable costs regimes, perhaps the time has arrived simply to costs manage proportionately, rather than argue as to the approach to, and the effect of, the regime.

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Published by Sweet & Maxwell Ltd, 5 Canada Square, Canary Wharf, London, E14 5AQ
ISSN 0958-9821

Typeset by Matthew Marley
Printed by Hobbs The Printers Ltd, Totton, Hampshire.

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