COSTS LAW UPDATE

James Bentley and Martin Lanchester

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Hunt v Annolight Ltd and Ors [2021] EWCA Civ 1663

CROSS EXAMINATION OF A SOLICITOR MAY BE PERMITTED…BUT ONLY IN CERTAIN CIRCUMSTANCES.

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Hunt v Annolight Ltd and Ors [2021] EWCA Civ 1663

Facts

- C issues proceedings for NIHL.
- Part 18s asked:

  ‘Weren’t you the director of the Defendant company?!’
- And - ‘But you said that ear plugs *had* been provided?’
- Signed by the Claimant. Goes to trial…

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Hunt v Annolight Ltd and Ors [2021] EWCA Civ 1663

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Hunt v Annolight Ltd and Ors [2021] EWCA Civ 1663

Application for dis-application of QOCS and/or wasted costs against solicitors.

1. Failed to obtain proper instructions on the Director point.
2. Were the Part 18s signed without Cs knowledge?
3. The ‘hearing protection point’.

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Hunt v Annolight Ltd and Ors [2021] EWCA Civ 1663

- First instance decision that Cs solicitors would need to give live evidence.
- The Claimant then starts to change his tune, but complains about his solicitors.
- Solicitors appeal the decision ordering them to attend for cross examination.

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Hunt v Annolight Ltd and Ors [2021] EWCA Civ 1663

First instance

- Appeal dismissed.
- The firm was no longer acting for the Claimant.
- Privilege had been waived.
- There were radically different accounts between C and his former solicitor.
- Cross examination would avoid satellite litigation.

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Hunt v Annolight Ltd and Ors [2021] EWCA Civ 1663

Court of Appeal

- There is a power to order cross-examination.
- BUT it had to be the exception rather than the rule.
- Issues of: privilege, fairness and disclosure.
- And if it is to be considered, then the scope should be limited – it should not be a fishing expedition.

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Hunt v Annolight Ltd and Ors [2021] EWCA Civ 1663

In this case:

- The allegations had not been properly defined.
- The evidence was not directly contradictory.
- ‘No evidence of instructions’ was of no evidential significance.
- Silence in the witness statement on an issue would = fishing.
- Privilege and disclosure had not been properly addressed.

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Hunt v Annolight Ltd and Ors [2021] EWCA Civ 1663

Takeaways:

1. Allegations when it comes to wasted costs must be as precise as possible.

2. The issue of privilege should be resolved.

3. Ideally, there should be some mechanism for disclosure.

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Walker v (1) TUI Ltd and (2) Dr. Leigh

THE BAR FOR JOINING AN EXPERT TO PROCEEDINGS IS A HIGH ONE.

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Walker v (1) TUI Ltd and (2) Dr. Leigh

Facts

- Claim for gastric illness whilst on holiday.
- Single Joint Expert – Dr. Leigh.
- Supports the claim.
- Dr. Leigh changes his evidence – the illness was caused *either* by the food *or* caught from wife.
- Wife's claim not found proven.
- Entire claim dismissed.

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Walker v (1) TUI Ltd and (2) Dr. Leigh

The test

The proper test was set out in *Phillips and Others v Sykes and Others (No 2) [2004] EWHC 2330 (Ch):*

Did the expert cause significant expense to be incurred by giving evidence recklessly and in flagrant disregard of his duties to the court?

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Walker v (1) TUI Ltd and (2) Dr. Leigh

- The test was one of exceptionality.
- That does not mean simply ‘outside the ordinary run of cases’.
- Experts were different to other third parties (e.g. legal advisors).
- So make sure the threshold is met before embarking down the road of a TPCO.

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Robinson v Mercier

BUT IT IS NOT INSURMOUNTABLE…

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Robinson v Mercier

Facts

- Claim for dental negligence.
- Extraction of a tooth in a hospital setting, under general anaesthetic, undertaken by a maxillofacial surgeon.
- So C instructs a dentist…

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Robinson v Mercier

Q. Can you speak to the standards attributable to an oral/maxillofacial surgeon?

A. I believe so.

Q. You have never actually occupied that position having never actually been an oral and maxillofacial surgeon, have you, no?

A. No, that's correct.

Q. Since 2000 you have never had a patient on a table under general anaesthetic?

A. Correct.

Q. Would you say you are as well placed as Mr Webster to speak to the standards to be applied to the evidence of an oral and maxillofacial surgeon?

A. No, Mr Webster is an oral and maxillofacial surgeon so he is going to have more experience in a hospital setting than I have.

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Robinson v Mercier

The answer "Mr. Webster is an oral and maxillofacial surgeon, so he is going to have more experience in a hospital setting than I have" is not a complete answer reflecting the reality. He's not simply going to have more experience in a hospital setting, he is going to have a lot of experience in a number of areas that Dr. Mercier just doesn't have. Dr. Mercier does not have any experience of managing a list in a hospital setting, of the facilities to be expected, of the competing pressures, and of the practice of the general body of such professionals.

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Ho v Adelekun [2021] UKSC 43

QOCS PREVENTS SET OFF OF COSTS v COSTS

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Ho v Adelekun [2021] UKSC 43

Where it all began

- C injured in RTA. Settled by way of Part 36 for £30,000.
- Dispute about whether fixed costs apply given the terms of agreement ('to pay *assessed costs*').
- November 2019 – Court of Appeal say fixed costs apply.

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Ho v Adelekun [2021] UKSC 43

So what was the problem?

- Court of Appeal makes costs order in Ds favour.
- D requests set off of appeal costs (£48,600) against the fixed costs due to C (£16,700).
- (N.B – couldn't be set off against damages. See *Cartwright v Venduct [2018] EWCA Civ 1654)*.

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Ho v Adelekun [2021] UKSC 43

Court of Appeal

- C argues QOCS should be a complete code and bar any enforcement.

- Very convincing, but…

- The issue had already been decided – see *Howe v Motor Insurers' Bureau [2020] Costs LR 297.*

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Ho v Adelekun [2021] UKSC 43

Supreme Court

- QOCS *is* intended to be a complete code about what a Defendant could do with costs orders made in its favour.
- Where there is no Order for damages and interest, there can be no enforcement.
- The CPRC need to look at the issue urgently.

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Discovery Land Company v Axis Speciality Europe SE [2021] EWHC 2146 (comm)

Proportionate does not = lowest possible amount

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Discovery Land Company v Axis Speciality Europe SE [2021] EWHC 2146 (comm)

Facts

- Liability of insurers under the Third Parties (Rights against Insurers) Act 2010 where claims of directors arose out of dishonesty.
- Claim valued at around £6m.
- Huge disparity in the budgets (£1,221,683.71 v £520,961).

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Discovery Land Company v Axis Speciality Europe SE [2021] EWHC 2146 (comm)

Kazakhstan Kagazy plc v Zhunus [2015] EWHC 404 (Comm), Leggat J:

'The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the circumstances.'

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Discovery Land Company v Axis Speciality Europe SE [2021] EWHC 2146 (comm)

Peter MacDonald Eggers QC:

'I am not certain why the 'touchstone' of reasonable or proportionate costs must be the lowest amount which a party could reasonably be expected to spend. Certainly in the context of costs management, the Court should allow some flexibility to the parties to ensure that their action is not unnecessarily and potentially unfairly hampered by an unrealistically low assessment or by only the lower assessment of what would constitute reasonable and proportionate expenditure. Expenditure which is within a reasonable and proportionate range is still reasonable and proportionate even if it is not at the lower end.'

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Part 36 overview

- Change to CPR36.5(5) Interest on Part 36 offers
- Pallett v MGN Ltd [2021] EWHC 76 (Ch)
  Acceptance of offers outside relevant period
- London Trocadero (2015) LLP v Picture house Cinemas Ltd [2021] EWHC 3103 (Ch)
  Genuine Offer of Settlement
- Global Energy Horizons Corporation v Gray [2021] EWCA Civ 123
  Defendant defence to an exorbitant claim

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Part 36 Basics

CPR 36.2 (2)

- “a self contained code” and “a carefully structured and highly prescriptive set of rules” Moore Bick LJ Gibbon v Manchester CC [2010] 1 WLR 2081

- “Nothing in this Section prevents a party making an offer to settle in whatever way that party chooses, but if the offer is not made in accordance with rule 36.5 it will not have the consequences specified in this Section.”

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Part 36.5 New Provision

- 36.5(4) A part 36 offer which offers to pay or accept a sum of money will be treated as **inclusive** of all interest until…(the end of relevant period)

- Civil Procedure (Amendments) Rules 2021 6th April 2021

- CPR36.5(5) A Part 36 offer to accept a sum of money may make provision for accrual of interest on such sum after the date specified in paragraph (4). If such an offer does not make any such provision, it shall be treated as inclusive of all interest up to the date of acceptance if it is later accepted.

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Part 36 Interest – previous costs cases

Horne v Prescot (No.1) Ltd [2019] EWHC 1322 (QB)

Part 36 offers can be ‘exclusive of interest’ in costs cases

King v City of London [2019] EWCA Civ 2066

Part 36 offers can not be ‘exclusive of interest’ whether substantive or in costs proceedings

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Part 36 Interest

Arnold LJ

I have reluctantly come to the conclusion that I agree that the appeal should be dismissed. It seems to me, however, that the issue merits consideration by the Civil Procedure Rules Committee. In my opinion there are arguments in favour of permitting Part 36 offers to be made which are exclusive of interest, at least in assessment proceedings if not in the general run of claims. If the Committee decides, however, that offers exclusive of interest should not be permitted, then I would suggest that rule 36.5 be amended to say so in terms. At the very least, PD47 paragraph 19 should be revised.

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Part 36 Interest

Note

- This relates to ‘Claimant’ or Receiving Party offers
- Would apply to counter-claims
- No rate of interest is specified
- It is not specified how Part 36.17 consequences will be determined after trial/DA

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Part 36 Interest - Who wins?

- How will courts deal with Claimant/Receiving party offers that are increasing with time?

- Was considered by Asplin LJ

  Calonne Construction Ltd v Dawnus Southern Ltd [2019] EWCA Civ 754

- Suggested outcomes would follow Purrunsing v A'Court [2016] EWHC 1528 CH- HHJ Pelling QC

- After trial, parties calculate the interest that would have applied to the damages as at the relevant date of the Claimant's offer to allow a comparison.

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Part 36 Interest

- Excessive interest sought by Claimant's/ receiving parties will not promote settlement
- Likely interest to run at rate equivalent to pleaded case
- Defendant may make own Part 36 with lower /nil interest.
- Defendant may wish to argue conduct –not real interest in settlement.

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Part 36 Acceptance after 21 days

Pallett v MGN Ltd [2021] EWHC 76 (Ch)

- Phone hacking case.
- Defendant sought to disapply period of Claimant's costs
- Defendant accepted Claimant's offer 1 day after 21 day period

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Part 36 Acceptance after 21 days

CPR 36.13(1)

If Defendant accepts within 21 days:

"the claimant will be entitled to the costs of the proceedings up to the date on which notice of acceptance was served on the offeror."

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Part 36 Acceptance after 21 days

CPR 36.13(4) (b)

If Defendant accepts after 21 days

Where.. a Part 36 offer which relates to the whole of a claim is accepted after expiry of the relevant period..

The liability for costs must be determined by the court..

Applying – all the circumstances of the case and matters listed in rule 36.17(5).

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Part 36 Acceptance after 21 days

In Pallett v MGN Defendant wished to argue the Claimant costs should not apply from date of the defence and so deliberately waited until 22 days after Claimant's offer.

Mr Justice Mann – upheld the Defendant's approach under CPR13(4) but thereafter found the Claimant was reasonable it waiting for disclosure before reaching settlement

CPRC- subcommittee set up to consider

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Part 36 Genuine Offer?

CPR 36.17(5)

(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—

(a) the terms of any Part 36 offer;

(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;

(c) the information available to the parties at the time when the Part 36 offer was made;

(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and

(e) whether the offer was a **genuine attempt** to settle the proceedings.

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Part 36 Genuine Offer

London Trocadero (2015) LLP v Picture house Cinemas Ltd [2021] EWHC 3103 (Ch)

- Part 36 offer to settle a relatively small proportion of the claim by discounting the contractual claim for interest
- Offer amounted to 99% of the total claimed was a genuine offer.
- Offer made, waited 21 days, then successfully applied for summary judgment.

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Part 36 – Genuine Offer

Defendant sought CPR 36.17 uplift on all of the claim and its costs .

Robin Vos – following Rawbank SA v Travelex Banknotes Limited [2020] EWHC 1619 (Ch)

Held – 99% was a genuine offer in this case

But some relief given to reflect wholly exceptional circumstances of the pandemic – ‘injustice’.

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Part 36 Genuine Offer

When considering whether Genuine Offer

- Defendants had said they would vigorously defend the claim.
- Claimant suspected Defendant was able to pay and chose not to
- The quantum was binary – either rent due or not
- The Defendant effectively had no defence

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Part 36.17 Uplift

Robin Vos: Supplementary points:

Part 36.17 consequences only applied to the part of the claim (damages and costs) the offer related to.

Part of additional amount can be applied rather than all or nothing.

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Part 36 Defence to exorbitant claim

- Global Energy Horizons Corporation v Gray [2021] EWCA Civ 123

- Complex and lengthy litigation for claim valued £228m.
- Defendant ordered to pay £3m (1.6% of claim)
- Costs ruling – “the overall result was that both parties lost heavily” “a score draw”
- No order for costs.

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Part 36 Defence to exorbitant claim

Court of Appeal

- Wrong to make no order as to costs.
- Claimant ‘won’ with damages over £3m
- “*When a defendant is faced with an exorbitant claim which he wishes to defend vigorously but where he is vulnerable to a finding that he is liable for a much smaller amount, there is a clear process provide by the CPR part 36 which he can follow to protect his position*”

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Part 36 Mistakes

O’Grady (widow and Executrix of Estate of Martin O’Brien) v B15 Group Limited [2022] EWHC 67 (QB)

Whilst CPR36 is ‘self contained code’ the doctrine of mistake persists ..

Part 36 offer 80:20 in the Defendant’s favour was a clear mistake.

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Costs Breakfast Bites

Questions

Many thanks

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COSTS LAW UPDATE

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