COSTS UPDATE

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Cases on:

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- Relevance of the costs budget to costs recovery
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Part 36 – late acceptance

Briggs v CEF Holdings [2017] EWCA Civ 2363

- Late acceptance by C of D's Part 36 offer where there had been uncertainty regarding C's prognosis

- C should pay D's costs following expiry of the relevant period: it was not "unjust" per r. 36.13 (5) and (6)

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- The fact that there had been uncertainty regarding C's prognosis was part of usual risks of litigation, and the purpose of Part 36 was to shift the risk to the offeree if he did not accept the offer. It was important not to undermine that purpose.

- c.f. *SG v Hewitt* (Costs) [2012] EWCA Civ 1053: Court departed from the normal rule to give weight to the particular features of the case of a young boy who had suffered frontal lobe damage at the age of six, where experts were unable to predict the impact of the brain injury until he fully matured.

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Part 36 – Genuine offer

JMX v Norfolk & Norwich Hospitals NHS Trust [2018] EWHC 185 (QB)

- Split trial in clinical negligence case. C wins on liability.
- C made Part 36 offer to accept 90% of the value of the claim. Was that a genuine attempt to settle the proceedings for the purposes of CPR r.36.17(5)(e)? Yes
- An argument that an assessment of the risks of litigation at only 10% could not be a genuine attempt to settle was one which could hardly ever succeed.

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Also held:

- The content of without prejudice discussions should not have been disclosed during the costs hearing
- 5% enhanced interest awarded r.36.17 (4)(c)
- D made no offers but nothing unreasonable about the decision to contest liability
- c.f. *OMV Petrom SA v Glencore* [2017] EWCA Civ 195 where 10% enhanced interest

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Part 36 and withdrawal of an offer

Ballard v Sussex Partnership NHS Foundation Trust [2018] EWHC 370

- D made two Part 36 offers, the first of which was withdrawn.
- C failed to beat either offer trial. Accepted that C pay D's costs from expiry of first offer. Issue: effect of first offer on order for costs.
- At first instance judge held that the second offer was irrelevant to effect of the first offer (which was to be taken into account under r.44.2 (4) (c)) and made an order that C pay D's costs from the date of the withdrawal of the first offer.

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- On appeal Foskett J held that the Judge was wrong, the second offer was relevant, and C was entitled to costs up to commencement of trial (expiry of second offer).

- Both offers had provided that (i) D pay the C's reasonable costs up until [the expiry date of the offer] or the date of acceptance of the D's offer and (ii) "for the avoidance of doubt, if the C fails to obtain a judgment more advantageous than the offer made in this letter then D will seek an order that C should pay both parties' costs from [the expiry date of the offer].

- Held: D could not escape from the precise terms of the second offer and therefore it was the first offer that was irrelevant.

- Reasoning questionable

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Part 36 and a payment on account

Nivin El Gamal v Synergy Lifestyle Ltd [2018] EWCA Civ 210

- Where, after the date of a Part 36 offer, a party to proceedings made a payment on account of the sums claimed, that payment resulted in a corresponding reduction in the amount of the Part 36 offer unless the paying party clearly stated, at any time prior to judgment or acceptance of the Part 36 offer, that it was not to be treated as having that effect.

- Followed *Littlestone v MacLeish* [2016] EWCA Civ 127 – the reasoning applies whether or not it was an “admissions payment”

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Part 36 and Provisional assessment

W Portsmouth & Co v Lowin [2017] EWCA Civ 2172

- The costs cap in CPR r.47.15 (5) was neither disapplied nor modified in respect of an award of indemnity costs under r.36.17(4).

- Where a party was awarded the costs of a provisional assessment on an indemnity basis under r.36.17(4), those costs would be subject to the cap.

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Costs management v Detailed assessment

Harrison v University of Coventry & Warwickshire NHS Trust [2017] EWCA Civ 792

- Where there was a proposed departure from a costs budget, be it upwards or downwards, the court on a detailed assessment could sanction such a departure only if satisfied that there was good reason for doing so (per r.3.18 (b)).

- Nothing in r.44.4 (3) (h) to tell against this interpretation. Rules can be read together.

- Give effect to the natural and ordinary meaning of r.3.18.

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- Good reason is a significant fetter on the court having an unrestricted discretion. Costs judges should therefore be expected not to adopt a lax or over-indulgent approach to the need to find “good reason”.

- That said, “good reason” provision gives a valuable and important safeguard in order to prevent a real risk of injustice.

- Incurred costs are not part of the approved or agreed budget and therefore would be the subject of detailed assessment in the usual way: there was no requirement for "good reason" to depart.

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- Comments on proportionality [para 52]:

  “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, having regard to CPR 44.3 (2)(a) and (5): a further potential safeguard, therefore, for the paying party.”

- Controversy: proportionality already considered re budgeted costs.

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Costs Management and Hourly Rates

RNB v London Borough of Newham [2017] EWHC B15 (Costs) Deputy Master Campbell held:

- If the receiving party's solicitors' hourly rates for work done before a costs management order were reduced on a detailed assessment, the court could and should apply the same reduction to costs which were the subject of an approved or agreed budget.

- **Bains v Royal Wolverhampton NHS** [2017] unreported, District Judge Lumb disagreed with the decision in RNB

- Permission to appeal given in RNB

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Proportionality at detailed assessment

May v Wavell, 22.12.17, unreported, HHJ Dight sitting with Master Whalan

- At D.A. Master Rowley assessed reasonable costs to be £99,695 plus VAT, but applying proportionality cross-check reduced to £35,000 plus VAT.
- On appeal allowed £75,000 plus VAT
- Held: that Master Rowley had considerably undervalued the sums in issue, gave too little weight to the complexity of the litigation and reduced the costs disproportionately because of early settlement

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- Various comments made by HHJ Dight in *May* as to the correct approach to proportionality, including that: “The rules, difficult as they may be to apply in practice, require the specific factors in CPR 44.3(5) to be focused on and a determination to be made as to whether there is a reasonable relationship between them. I doubt that the rules committee intended that a costs judge could or should bypass an item by item assessment and simply impose what he or she believed to be a proportionate global figure.”

- Criticism made of use of blunt instrument or impressionistic approach, however sum allowed still impressionistic.

- Higher court guidance required

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Proportionality & additional liabilities

BNM v MGN [2017] EWCA Civ 1767

- Court of Appeal overturned decision of Senior Costs Judge Master Gordon-Saker.

- New proportionality rules contained in r.44.3(2) and r.44.3(5) did not apply on standard basis assessment to a "pre-commencement funding arrangement" as defined in r.48.1.

- Success fees payable under CFAs and premiums payable under ATE policies are not subject to proportionality cross-check.

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- Former proportionality “test” contained in old r.44.4(2) applied.
- If it had been intended that new proportionality test was to apply to those funding arrangements that would have been made clear in the statutory provisions or new costs rules or both and it was not.
- Assessment remitted to Senior Costs Judge to consider proportionality again

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Taking out ATE insurance post 1.4.13

Peterborough & Stamford Hospitals NHS Trust v McMenemy [2017] EWCA Civ 1941

- In clinical negligence claims it remained reasonable to take out ATE insurance for expert reports at the same time as solicitors were instructed. The premiums were in principle recoverable where cases settled without the issue of proceedings.

- No reason to depart from policy decision in *Callery v Gray* and examine reasonableness of taking out ATE insurance on a case-by-case basis despite QOCS and the enactment of Courts and Legal Services Act 1990 s.58C and Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No. 2) 2013

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- The recoverability of such ATE premiums in clinical negligence cases are not covered by the old regime. CPR provisions prior to 1 April 2013 do not apply.

- The provisions about proportionality apply to post-April 2013 clinical negligence claims.

- Wrong for DJ to find that although it was reasonable to take out ATE insurance against the cost of reports on causation it was unreasonable to insure against the cost of reports on liability: no evidence on which he could have come to the conclusion that any such limited ATE insurance was available in the market.

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- Questions relating to quantum of the premium are to be considered by the court in another test case, but relevant comments made:

  “It may well be that it would be open to a D to argue that it was unreasonable or disproportionate to take out one kind of ATE insurance rather than another …it may be that it would be unreasonable in some cases to take out a single premium policy rather than one with stage payments; or one with the possibility of rebated premiums.”

- Rules Committee invited to reconsider its view that there was no need for rules or practice directions dealing with the recovery of ATE insurance premiums in clinical negligence cases.

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Topping up ATE

Plevin v Paragon Personal Finance [2017] UKSC 23

- Having an ATE policy relating to the costs of the trial before the commencement of LASPO 2012 was enough to entitle the insured to continue to use the costs regime under the Access to Justice Act 1999 for subsequent stages of the proceedings under “top-up” amendments made to the policy after that date.

- Purpose of the transitional provisions of 2012 Act, in relation to both success fees and ATE premiums, was to preserve vested rights and expectations arising from previous law. Purpose would be defeated by a rigid distinction between different stages of the same litigation.

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QOCS and pre-commencement funding arrangements

Catalano v Espley-Tyas [2017] ECWA Civ 1132

- Transition provisional re QOCS (r.44.17) re pre-commencement funding arrangement (r.48.2)

- Where litigation services had been provided under CFA which provides for success fee made before 1 April 2013, success fees could continue to be recovered as costs and QOCS would not apply even if CFA was terminated and 2nd CFA was made.

- Not right to read word "un-terminated" into CPR 48.2(1)(a)(i).

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- Not concluded view where:

(i) CFA is made before 1 April 2013 but, before any work is done, a second CFA is made after 1 April 2013, or

(ii) where work is done but the retainer is terminated (whether by the solicitors or the client) before 1 April 2013 and a second CFA is made by new solicitors after 1 April 2013

- However (i) rare; and (ii) doubtful QOCS

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QOCS – PCFAs and additional defendants

Corstorphine v Liverpool City Council [2018] EWCA Civ 270

- CFA and ATE pre 1.4.13 against D1. No CFA or ATE in claims added against D2 and D3
- D1 brings additional claim against D2 and D3
- C loses and additional claim is dismissed.
- C is entitled to adverse costs protection pursuant to QOCS re claims against D2 and D3
- The matter that is subject of proceedings is the underlying dispute. Claims against D2 and D3 at time of PCFAs were not the underlying dispute and not subject of the retainer.
- The costs of D2 and D3 should not be added to the costs of D1 which C had been ordered to pay.

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QOCS and pleading

Howlett v Davies and Ageas [2017] EWCA Civ 1696

- Claimant fundamentally dishonest, and therefore exception to QOCS under CPR r.44.16(1) applied, despite fraud not having been alleged in insurer's defence.

- Where findings properly made by trial judge warranted conclusion that substantive claim was fundamentally dishonest, an insurer could invoke r.44.16(1) regardless of whether there was any reference to fundamental dishonesty in its pleadings.

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CA agreed that HHJ Moloney's comments in *Gosling v Hailo* on meaning of FD were common-sense. Comments made included that:

"…one sees that what the rules are doing is distinguishing between two levels of dishonesty: dishonesty in relation to the claim which is not fundamental so as to expose such a claimant to costs liability, and dishonesty which is fundamental, so as to give rise to costs liability…

If …the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty".

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QOCS and discontinuance

Mabb v English [2017] EWHC 3616 (QB)

- Clinical negligence claim. D applied to strike out claim on basis no reasonable prospect of success. C discontinued.

- On the facts and in the absence of fraud, there was no inherent unfairness in a C filing a notice of discontinuance in a clinical negligence claim so as to avoid the effect of r.44.15, namely that if the claim were struck out instead, an exception to QOCS would apply.

- The possibility was not ruled out, on different facts, that something less than fraud might make it appropriate to set aside a notice of discontinuance, but that was not the instant case.

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