Challenging Claimant's Costs

Costs significantly affect the total cost of claims for Defendants and their Insurers. In many cases the costs of the litigation far exceed the damages.

Minimising the outlay on costs has to be a key consideration in defending any personal injury claim. Considering costs should not be left to the conclusion of the claim. Steps can be taken before and during proceedings to obtain favourable costs orders, reduce the amount that can be recovered and to facilitate the best possible outcome at summary or detailed assessment.

In these notes details of the most important rules on costs affecting the conduct of a claim and summaries of some cases to refer to and rely upon are set out. The notes supplement the power-point slides, which are in a separate document.

CPR 44.3, 44.4 and 44.5: The framework for considering costs

It is essential that anyone who conducts litigation is familiar with these rules of the CPR. They set out clearly the matters that the court must have regard to in deciding costs orders and assessing costs. Therefore they parties should not lose sight of those rules during the course of a claim; they should influence the conduct of the defence and matters that raised. Under the CPR costs do not simply follow the event, there are many other factors.

Rule 44.3 - Court's discretion and circumstances to be taken into account when exercising its discretion as to costs

(1)The court has discretion as to -
(a) whether costs are payable by one party to another;
(b) the amount of those costs; and
(c) when they are to be paid.

(2) If the court decides to make an order about costs -
(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
(b) the court may make a different order.

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including -
(a) the conduct of all the parties;
(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; an
(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36). (Part 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part)
(5) The conduct of the parties includes -
(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and
(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

(6) The orders which the court may make under this rule include an order that a party must pay -
(a) a proportion of another party's costs;
(b) a stated amount in respect of another party's costs;
(c) costs from or until a certain date only;
(d) costs incurred before proceedings have begun;
(e) costs relating to particular steps taken in the proceedings;
(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a
date before judgment.

(7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c).

Rule 44.4 - Basis of Assessment

(1) Where the court is to assess the amount of costs (whether by summary
or detailed assessment) it will assess those costs -
(a) on the standard basis; or

(b) on the indemnity basis,
but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(2) Where the amount of costs is to be assessed on the standard basis, the court will -
(a) only allow costs which are proportionate to the matters in issue; and
(b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.
(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.
(4) Where -
(a) the court makes an order about costs without indicating the basis on which the costs are to be assessed; or
(b) the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the costs will be assessed on the standard basis.

Rule 44.5 - Factors to be taken into account in deciding the amount of costs

(1) The court is to have regard to all the circumstances in deciding
whether costs were -
(a) if it is assessing costs on the standard basis -
(i) proportionately and reasonably incurred; or
(ii) were proportionate and reasonable in amount, or
(b) if it is assessing costs on the indemnity basis -
(i) unreasonably incurred; or
(ii) unreasonable in amount.

(2) In particular the court must give effect to any orders which have already been made.

(3) The court must also have regard to -
(a) the conduct of all the parties, including in particular -
(i) conduct before, as well as during, the proceedings; and (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
(b) the amount or value of any money or property involved;
(c) the importance of the matter to all the parties;
(d) the particular complexity of the matter or the difficulty or
novelty of the questions raised;
(e) the skill, effort, specialised knowledge and responsibility
involved;
(f) the time spent on the case; and
(g) the place where and the circumstances in which work or any part of it was done.
(Rule 35.4(4) gives the court power to limit the amount that a party may recover with regard to the fees and expenses of an expert)

Proportionality

The level of damages is the starting point for assessment of the reasonableness of the costs incurred. Reducing the damages therefore should also serve to reduce the costs. The seminal case on proportionality and the principles to be applied on assessment is *Lownds*.

Secretary Of State For The Home Department V Karl Edward Lownds [2002] EWCA Civ 365

Held: Whether the costs incurred were proportionate should be decided having regard to what it was reasonable for the party in question to believe might be recovered. Therefore: (a) the proportionality of costs recovered by the claimant should be determined having regard to the sum that it was reasonable for him to believe that he might recover at the time he made his claim; and (b) the proportionality of the costs incurred by the defendant should be determined having regard to the sum that it was reasonable for him to believe that the claimant might recover, should his claim succeed.
A two-stage approach was required: a global approach, followed if necessary by an item-by-item consideration. The global approach would have indicated whether the total sum claimed was or appeared to be disproportionate having regard to the considerations which CPR 44.5(3) stated as relevant. The item-by-item consideration required assessment of necessity as well as reasonableness.

"… the Costs Judge will have regard to whether the appropriate level of fee earner or counsel has been deployed, whether offers to settle have been made, whether unnecessary experts had been instructed and the other matters set out in Part 44.5(3). Once the decision is reached as to

proportionality of costs as a whole, the Judge will be able to proceed to consider the costs item by item, applying the appropriate test to each item".

The dicta of HHJ Alton in *Jefferson v National Freight Carriers Plc* was cited with approval in *Lownds*: "In modern litigation, with the emphasis on proportionality, it is necessary for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time that would be necessary and the appropriate spend on various stages in bringing the action to trial and the likely overall cost. While it was not unusual for costs to exceed the amount in issue, it was in the context of modern litigation such as the present case, one reason for seeking to curb the amount of the work done, and the cost by reference to proportionality".

Have the Claimant's solicitors complied with that guidance?

A recent example of the application of *Lownds* and the Part 44.5 factors in the personal injuries context is:

Stephen Pask v McNicholas Construction Services Ltd Sup Ct Costs Office (Costs Judge Simons) 31/5/2006

The defendant (M) sought an order that the costs of the claimant (P) were disproportionate. The claim was put at approximately £769,000. Initially P's costs had been estimated at £40,000. Ten months later a settlement was reached, the terms of which were that P accepted an offer in the sum of £678,500 and that M pay P's costs that at that stage had reached £269,000.

Held: In considering whether the costs were disproportionate, reference had to be made to CPR r.44.5(3) and a number of different factors: the conduct of the parties, including conduct during the proceedings; the effort made to settle; the amount of money in dispute; the importance of the matter to the parties; the particular complexity of the matters and the difficulty or novelty of the questions raised; the skill, effort, specialised knowledge and responsibility involved; the time spent on the case; and the place where, and the circumstances in which, the work was done. Taking all those factors into account, the net costs excluding VAT did appear to be disproportionate in a case where £678,000 damages had been recovered, where liability was not in issue and where the case was settled before trial. For the costs to have risen from an approximate estimated £40,000 to £269,000 in a period of ten months gave the impression that there was a total lack of planning about the costs and a failure to carry out the litigation in an economic and proportionate manner, Lownds applied.

In *Devine v Franklin* [2002] EWHC 1846 (QB) a successful claimant who exaggerated his injuries and claim for damages was confined to the fixed costs permitted for a small claims track case. The principle of Lownds applied and C was confined to the costs to which he would have been entitled had there been no exaggeration. The claimant was also entitled to recover a sum in respect of the unreasonable behaviour of the defendant.

Conduct

A rule that is sometimes overlooked, but is perhaps of wider application than the heading of the rule may suggest is 44.14. It is relevant where there has been deliberate flouting of the pre-action protocol and it is worth flagging up in correspondence than you intend to refer to that rule.

Rule 44.14 - Court's powers in relation to misconduct

(1) The court may make an order under this rule where -
(a) a party or his legal representative, in connection with a summary or detailed assessment, fails to comply with a rule, practice direction or court order; or
(b) it appears to the court that the conduct of a party or his legal representative, before or during the proceedings which gave rise to the assessment proceedings, was unreasonable or improper.
(2) Where paragraph (1) applies, the court may -
(a) disallow all or part of the costs which are being assessed; or
(b) order the party at fault or his legal representative to pay costs which he has caused any other party to incur.
(3) Where -
(a) the court makes an order under paragraph (2) against a legally represented party; and
(b) the party is not present when the order is made, the party's solicitor must notify his client in writing of the order no later than 7 days after the solicitor receives notice of the order.

The premature issue of proceedings may justify an adverse costs order. But, the Defendant's conduct also should be reasonable:

Sarah Binch v David Freeman CC (Stoke on Trent) 6/12/2005

The defendant (F) sought costs in an action commenced by the claimant (B) for personal injuries sustained in a road traffic accident. Liability was not in issue, so F requested full details of the claim from B. There was a subsequent letter from B proposing three medical experts, but F did not respond and the former instructed a medical expert. Without having had sight of any medical evidence, F made an offer to settle, which was rejected. B sent her medical evidence to F with a letter stating that an unacceptable settlement offer would result in the issue of proceedings. F then made a further offer in full and final settlement. B never received the letter of offer and wrote to F's insurers announcing that proceedings had been commenced on that day. However, they were not issued for another 24 days, and as no action was taken by F or his insurers, judgment in default was entered. Two months later, F wrote to B referring to the offer to settle and paid the sum offered into court. Although the offer was acceptable to B, no agreement was reached as to costs, so F applied for his costs to be paid by B.

HELD: B's letter threatening proceedings was in no uncertain terms an ultimatum, and B's following letter, in default of a reply from F, incorrectly stated that proceedings had been issued that day rather than, in the spirit of co-operation and negotiation as required by the CPR r.1.1(1) and encouraged by the pre-action protocol, asking whether F was willing to negotiate. That action was unjustified, particularly as, in breach of the pre-action protocol, the proceedings were accompanied by a schedule of loss that had not been served 21 days before issue. F had indicated from the outset a willingness to make offers. It was wrong for solicitors to send the medical report and, in the absence of reply, issue proceedings without further enquiry. This was a premature approach with no attempt to negotiate within the spirit of the pre-action protocol, and there was no reason for B to conclude that there could be no negotiation, having regard to what had occurred in the past. Had B contacted F's insurers to find out what was going on, a settlement would probably have been reached without the need for the issue of process. However, that did not mean that B should pay F's costs. Having received the letter stating that proceedings had been issued, F was not justified in assuming that the second offer was rejected. He could and should have telephoned or written to B's solicitors to enquire, and had he taken that very simple step upon receipt of the letter, all the costs could have been avoided. Accordingly, whilst on the one hand B should not have issued proceedings, the costs incurred by F had been brought upon himself by his own inactivity rather than by any action on the part of B and he was not entitled to his costs.

Exaggeration

The principles in respect to proportionality and the application of 44.3 and 44.5 are most clear where the contention that the Claimant has exaggerated his claim applies. The tactics used to attack a possibly exaggerated claim are also useful to attack the costs of a claim on the basis of exaggeration e.g. surveillance, inconsistent statements. The issue of exaggeration should be raised in correspondence, preferably in a counter-schedule and, if appropriate in offers. The letters and documents can then be referred to in points of dispute.

It is easier to argue that there has been exaggeration to justify an adverse costs order against a Claimant, where the Court has made a specific finding at trial. However, settlement of the claim should not preclude the Court taking into account exaggeration in the order for costs (if the issue is kept open) or on assessment, subject to the cases that will be referred to further below.

Three cases illustrate the potential consequences of a finding of exaggeration on costs, however, it is clear from the most recent case, *Jackson v MOD*, that whether or not the Claimant has beaten the payment into Court/offer remains crucial to the order:

Anthony Molloy v Shell UK Ltd [2001] EWCA Civ 1272

Defendant ('S') admitted liability and made a payment into court of £20,000. Claimant ("M") filed a schedule of loss claiming over £300,000 for past and future loss of earnings, including the fact that he would never be able to return to work on an oil platform. Days before the trial, S discovered that M had in fact returned to the oil platform as a scaffolder and had worked there on a fairly regular basis for three years. It was plain that the claim had been grossly and deliberately exaggerated. The judge awarded M just £18,897, which was less than the gross amount paid into court, and ordered him to

pay 75 per cent of S's costs. The judge recorded that M had grossly deceived his GP and medical experts who had examined him, concluding that he had been spectacularly dishonest. Counsel for S submitted that the judge was wrong in ordering M to pay only 75 per cent of the costs in view of M's dishonesty, claiming that the full amount was payable.

HELD: (1) S's claim that the dishonesty was so gross as to justify M paying all of the costs was one which had merit. It was obvious that M did not better the payment in and the only way in which the judge's discretion should have been exercised was to award S all of its costs. (2) The judge was obliged under CPR Part 44.35 to consider M's conduct in the case. M had abused the court's process and in such circumstances the court should wonder whether, following such an abuse of the civil court process, M's claim should be considered at all. In any event, M would walk away with very little. Appeal allowed. S to be awarded its costs in full.

*Yvonne Hazel Painting v University of Oxford [20*05] EWCA Civ 161

P had sought damages, based upon her pleaded injuries, in excess of £400,000. A payment into court was made by O in the sum of £184,442 shortly before the trial. However, soon after O had belatedly realised that it had video surveillance evidence which had undermined the severity of P's injuries and the duration of her symptoms. On that basis O was granted permission to withdraw all but £10,000 of the payment into court. At the hearing to determine the assessment of damages P had maintained her stance that she had suffered a long term debilitating injury justifying an award of £400,000. The judge found that she had exaggerated her injuries and accordingly made an award of £23,331 by way of damages. On the basis that P had beaten the payment into court, the judge ordered O to pay her costs on the grounds that the reduced payment into court had been a sum which P could not have been expected to accept, and that although he had found that she had exaggerated the claim, it had not justified departing from the usual order that costs follow the event.

HELD: The issue before the judge had essentially been whether P had exaggerated her claim. It was then, and only then that he came to determine quantum. The totality of the judge's decision, once he had found that the claim had been exaggerated, had been in favour of O. The judge had failed to take that into account. Further, the judge had failed to take into account the probability that if it were not for the exaggerated claim, the matter would have settled at an early stage. When determining the issue of costs the court was required to have regard to the conduct of the parties (see CPR 44.3(iv)(a)), and whether the claim had been exaggerated (see CPR 44.3(v)(d)). Whilst the CPR made no distinction between intentional and unintentional exaggeration, the fact that there had been an intentional exaggeration had to be considered in any assessment of costs. Further, at no stage during the proceedings did P make an offer or counter offer, nor did she make attempts to accept the payments into court. A claimant who had made no attempt to negotiate should expect the court to take that failure into account when determining costs. To commence and lose a matter on the ground that the claim was exaggerated without making any attempts to settle was a deciding factor. It was not apparent in the instant case that the judge took those matters into consideration. Accordingly, the exercise of his discretion had been flawed. The costs order was set aside and substituted for one that O pay P's costs down to the date of the payment into court, and P pay all of O's costs thereafter, Islam v Ali (2003) EWCA Civ 612 and Molloy v Shell UK Ltd (2001) EWCA Civ 1272 applied.

*Jackson v Ministry of Defence [2*006] EWCA Civ 46

The appellant MOD appealed against an order for costs made in favour of the respondent soldier (J) following a trial for quantum in a personal injury action. The medical evidence did not support J's claim of residual disability and those claims were eventually abandoned, reducing his claim from over £1 million to £240,000. The MOD made a CPR Part 36 payment into court in the sum of £150,000. The parties were ordered to attend a pre-trial joint settlement meeting but no agreement was reached. Damages of £155,000 were awarded with costs reduced by 25 per cent to reflect the fact that the award had only just beaten the payment into court and the fact J had exaggerated his evidence. The MOD contended that (1) the judge should have taken into account the proceeds of the joint settlement meeting as it had gone with the intention to negotiate and had made an offer to settle; (2) the costs should have been reduced by more than 25 per cent as J had exaggerated his claim and the reduction did not reflect the fact that the MOD had incurred expenses trying to meet the exaggerated claim.

HELD: (1) The scheme for joint settlement meetings made it clear that the process was confidential and that offers made and rejected were confidential unless stated to be without prejudice as to costs. No inferences could be drawn from the fact that the parties attended the meeting. (2) J successfully established a claim for substantial damages and beat the payment into court. The MOD could have protected its position by making an earlier Part 36 offer and by making a further payment in after the unsuccessful joint settlement meeting. The judge clearly took into account the fact that J had only just beaten the payment in and it was open to the MOD to challenge specific items at the detailed assessment. The reduction that the judge made in costs and the likely reduction at the detailed assessment were likely to act as a disincentive to claimants who sought to make exaggerated claims. The order made was well within the judge's wide discretion.

When to raise conduct?

On the basis of *Joseph Aaron v Michael Shelton* [2004] EWHC 1162 (QB) it had seemed that conduct had to be raised during the course of proceedings and in the terms of settlement, despite this appearing to be inconsistent with 44.3 and 44.5:

In that case proceedings between the claimant (C) and the defendant (S) had been settled at trial by a consent order that the action be dismissed and C pay S's costs on an indemnity basis. At the detailed assessment C sought a reduction on the basis of S's alleged conduct of the proceedings. The costs master ruled that C could have raised that issue before the trial judge and that it would be disproportionate to incur the costs of investigating the allegations and contrary to the overriding objective. C submitted that a paying party could raise issues of conduct to seek a reduction in costs either at the time the costs order was made or at the assessment.

HELD: Where a party wished to raise a matter concerning the conduct of his opponent it was his duty to raise it before the judge making the costs order where it was appropriate to do so, such as where the judge was in a position to deal with the matter because of his involvement with the case. If he failed to do so it was not open to the party to raise the same matter under CPR r.44.5(3) as a ground for the reduction of the costs that he would otherwise have to pay. It was an abuse of process to raise an issue before the costs judge that should have been raised before the judge making the costs order.

In *Nicholas Drukker & Co v Pridie Brewster & Co* [2005] EWHC 2788 (QB), in line with *Aaron v Shelton,* it was held that it was an abuse of process to seek to raise before the costs judge, by way of the points of dispute to the bill of costs on a detailed assessment, matters that could, and should, have been litigated before the court after the exchange of the pleadings in the pre-action protocol, but that had not been pursued after the protocol had run its course. The action was in respect to professional negligence and it was also held that it was highly questionable whether a costs judge had the jurisdiction to hear claims of professional negligence involving the issues and allegations raised. The type of trial that would have been required to resolve the issues in the instant case were entirely unsuitable by reasons of the factual complexities and subject matter for trial by a Costs Judge. Such matters should have been tried in the High Court.

However, the Court of Appeal has very recently doubted *Aaron v Shelton* and reached a different view, which is more helpful for Defendants, on when conduct can be raised.

(1) Northstar Systems Ltd (2) Seaquest Systems Ltd (3) Ultraframe (Uk) Ltd V Fielding & Ors [2006] EWCA Civ 1660

The appellant companies (U) appealed against a costs order made against them in respect of proceedings between them and the respondents (F). U had been unsuccessful in the substantive proceedings; however, the judge made a finding that F had been guilty of serious dishonesty in that they had lied and sought to maintain forged documents. Preliminary issues had been tried in two actions between the parties before the principal action was heard. The judge held that U had incurred disproportionate costs in proving a fraudulent conspiracy by F. He made a deduction of 20 per cent in F's favour. The issues for determination were (i) whether the percentage by which the judge had reduced the costs payable by U to F properly reflected the costs incurred by U in establishing the dishonesty found by the judge; (ii) whether the judge had erred in ordering U to pay the costs of the trial of the preliminary issues without any discount in relation to the dishonesty he had found established.

HELD: (1) In a case like the instant where dishonesty had been found, the fact that the paying party had not sought an order from the judge reflecting that misconduct did not deprive that party of referring on the assessment to the finding of dishonesty when considering whether the costs incurred by the dishonest party were reasonable, Aaron v Shelton (2004) EWHC 1162 (QB) , (2004) 3 All ER 561 doubted. Where a paying party had in his favour a finding that the successful party had been dishonest, and raised that factor as a ground for a reduction of the costs at the end of the trial, and the judge ordered a reduction, the natural construction of that order, unless the contrary was expressly stated, was that the party guilty of dishonesty should not be entitled to argue on assessment that the costs he incurred in seeking to make a dishonest case could be taken as reasonably incurred because the judge had made a reduction. Consideration of a party's conduct should normally take place both at the stage when the judge was considering what order for costs he should make, and then during assessment. However, the dishonest party should not be placed in double jeopardy. Where dishonest conduct was being reflected in a costs order made by a judge, it would be advisable for the judge to make clear whether he was making the order on the basis that, on assessment, the paying party would still be entitled to raise the dishonesty point in arguing that the costs incurred in making the dishonest case were unreasonably incurred. The concession made by F was rightly made. Once the proper construction of the order was understood and the concession was made, the order could not be attacked on the basis that U did not receive proper credit for the costs they incurred in establishing F's dishonesty. (2) The judge, in considering the order he was to make on costs, had fully recognised the relevance of the allegations of dishonesty to the litigation as a whole. He had asked himself the question whether the deduction he was proposing in relation to the costs of the remaining actions should be applied to the costs of trying the preliminary issues. His decision that it should not be applied was well within his discretion and it had not been established that he had misdirected himself in any way.

Although on the basis of *Northstar* it would appear that raising conduct can be left to assessment that arguably only applies where there has been a finding in relation to conduct that can be applied by the costs judge. There is difficulty in a costs judge being able to properly consider issues of conduct or exaggeration where there have been no hearings at which relevant findings could be made. If the issues could have been raised at a previous hearing, but the Defendant does not do so then there is a real risk of a finding of abuse of process if they are then raised on assessment.

Any factors under Part 44.3 and Part 44.5 should be raised in correspondence, pleadings and before the Court at applications or CMCs as they come up. Where the Court is able to make a finding at an interlocutory hearing about the conduct of a party and record it in a judgment, order, or at least a note on the Court file to that effect then the Defendant should ask the Court to do so. If a finding is made the Defendant should be in a much better position to seek a more favourable costs order.

When settling cases it is important to consider whether you should reserve the client's position on the Order for costs, so that conduct issues can be properly raised and findings made before detailed assessment. It can be appropriate to ask for a separate hearing to be listed or sometimes being able to raise conduct at trial is a factor which could be persuasive in running all the way. Of course agreeing damages may be more difficult where you are not prepared to simply agree to pay the Claimant's costs to be assessed if not agreed.

Applications and Case Management Conferences

Conduct should be raised at hearings, where appropriate, as referred to above.

The guidance in the 29PD.7 is relevant:

Failure To Comply With Case Management Directions

7.1 Where a party fails to comply with a direction given by the court any other party may apply for an order that he must do so or for a sanction to be imposed or both of these.
7.2 The party entitled to apply for such an order must do so without delay but should first warn the other party of his intention to do so.
7.3 The court may take any such delay into account when it decides whether to make an order imposing a sanction or to grant relief from a sanction imposed by the rules or any other practice direction.
7.4 (1) The court will not allow a failure to comply with directions to lead to the postponement of the trial unless the circumstances are exceptional.
(2) If it is practical to do so the court will exercise its powers in a manner that enables the case to come on for trial on the date or within the period previously set.
(3) In particular the court will assess what steps each party should take to prepare the case for trial, direct that those steps are

taken in the shortest possible time and impose a sanction for non-compliance. Such a sanction may, for example, deprive a party of the right to raise or contest an issue or to rely on evidence to which the direction relates.
(4) Where it appears that one or more issues are or can be made ready for trial at the time fixed while others cannot, the court may direct that the trial will proceed on the issues which are then ready, and direct that no costs will be allowed for any later trial of the remaining issues or that those costs will be paid by the party in default.
(5) Where the court has no option but to postpone the trial it will do so for the shortest possible time and will give directions for the taking of the necessary steps in the meantime as rapidly as possible.
(6) Litigants and lawyers must be in no doubt that the court will regard the postponement of a trial as an order of last resort. Where it appears inevitable the court may exercise its power to require a party as well as his legal representative to attend court at the hearing where such an order is to be sought.
(7) The court will not postpone any other hearing without a very good reason, and for that purpose the failure of a party to comply on time with directions previously given will not be treated as a good reason.

Be aware of an unreasonable refusal to an application:

La Chemise Lacoste Sa & Ors v Sketchers Usa Ltd Ch D (Mann J) 24/5/2006

Under the CPR the costs of any amendment application that ought to have been consented to would be visited against the opposing party. It behoved parties in litigation to be sensible about applications by the other side and not unreasonably refuse.

Costs Estimates

The importance of costs estimates should not be overlooked. The amended Section 6 of the Costs Practice Direction, picks up from the Court of Appeal's guidance:

*Leigh v Michelin Tyre Plc [*2003] EWCA Civ 1766

HELD: (1) It would not always be possible at the AQ stage to provide a reasonably accurate estimate of the likely overall costs but it should usually be possible to do so even at that stage especially in run of the mill cases. Where it became clear that the AQ estimate was inaccurate, it was all the more important to comply with the obligation in para.6.4(2) CPR PD 43 to file an updated estimate at the LQ stage. (2) The provisions in the Practice Direction as to the giving of estimates of costs at various stages of the litigation were made pursuant to the power in the court to regulate its own procedure within the limits set by the rules and to fill in gaps left by those rules. CPR 43 PD para.6.6 did not introduce criteria for the assessment of costs which were inconsistent with or additional to those contained in CPR 44.5 itself. It merely spelled out explicitly what was implicit in the broad power conferred on the court by CPR 44.5. CPR 43 PD para.6.6 did not fetter the court's discretion in relation to the assessment of costs. (3) The practice direction was expressed in clear mandatory terms: costs estimates must be provided. (4) If, as in this case, there was a substantial difference between the estimated costs and the costs claimed, that difference called for an explanation. In the absence of a satisfactory explanation the court might conclude that the difference itself was evidence from which it could conclude that the costs claimed were unreasonable. (5) The court might take the estimated costs into account if the other party showed that it relied on the estimate in a certain way. (6) The court might take the estimate into account in cases where it decided that it would probably have given different case management directions if a realistic estimate had been given. (7) It would not be a correct use of the power conferred by para.6.6 to hold a party to its estimate simply to penalise it for providing an inadequate estimate. (8) The costs judge should determine how, if at all, to reflect the costs estimate in the assessment before going on to decide whether, for reasons unrelated to the estimate, there were elements of the costs claimed which were unreasonably incurred or unreasonable in amount. (9) In this case M did not rely on the estimate in the AQ and the court would not have managed the case differently if a more realistic estimate had been given. L should not be penalised because the estimate was seriously inadequate.

Costs Capping

The Court has been most willing to make a prospective costs capping order in the context of group litigation. Proportionality is key:

Various Ledward Claimants v Kent & Medway Health Authority & East Kent Hospitals NHS Trust **(**[2003] EWHC 2551 (QB)

Application for a costs capping order in group litigation. The 59 claimants alleged that they were raped or sexually assaulted by a consultant gynaecologist ('L') when they were patients in his care and he

was employed by the defendants. The claimants' solicitors were a single principal firm based in Cornwall. The claimants lived in Kent, where L had practised.

HELD: (1) The court had power under s.51 Supreme Court Act 1981 and CPR Part 1 to make a cost capping order. Since the introduction of the Civil Procedure Rules 1998 SI 1998/3132 and the overriding objective judges had been encouraged to take control of costs at an early stage of the management of an action. This was litigation in which there was a real risk that costs had been and would be incurred unnecessarily and unreasonably. (2) If the claimants' solicitors did not have sufficient resources to undertake litigation at this level, the defendants could not be expected to pay the penalty. Where costs claimed appeared to the costs judge or judge to be disproportionate, the test to be applied, following the decision in Home Office v Lownds (2002) 1 WLR 2450, was the test of necessity, in addition to the test of reasonableness. (3) Where a client instructed a distant solicitor, the court must be astute to ensure that a paying party was not required to pay more in costs than if local solicitors had been employed. The claimants' solicitor had purchased a property in Kent and that property should be treated as a local office of the firm. The solicitor would then be entitled to the guideline rate for that area, which was probably the same as in Cornwall, and would be allowed travelling expenses from that office to court and to counsel on the basis of commuting to London from Kent.

The principles to apply outside group litigation were considered in:

Smart v East Cheshire NHS Trust [2003] EWHC 2806 (QB)

HELD: (1) The court did have jurisdiction to make costs cap orders (2) The court should consider making a costs cap order where the applicant showed by evidence that: (i) there was a real and substantial risk that without such an order costs would be disproportionately or unreasonably incurred; (ii) the risk could not be managed by conventional case management and a detailed assessment of costs after trial; and (iii) it was just to make such an order. It was very unlikely that it would be appropriate for the court to adopt a practice of capping costs in the majority of clinical negligence cases. These observations were confined to cases other than where group litigation was involved. (3) This was not a case where a costs cap order should be made. As S's solicitors were experienced in this field, there was not a real and substantial risk that costs would be disproportionately or unreasonably incurred. A detailed post trial assessment was sufficient in the instant case to ensure that costs did not become disproportionate. (4) Further observations to assist in applications for costs cap orders were: (a) when an application was made it had to be supported by evidence showing a prime facie case that the above conditions could be satisfied; (b) the allocation and listing questionnaires would have attached estimates of the likely overall costs which should give a good guide; (c) the court should be able to deal with an application at a comparatively short hearing; and (d) the benefit of the doubt in respect of the reasonableness of prospective costs should be resolved in favour of the party being capped. The order should also include a provision for uplift in certain circumstances.

Smart was followed in the most recent case considering such orders:

Andrew Knight (Aka Bowvanyne) v (1) Beyond Properties Pty Ltd (2) Beyond International Ltd (3) Beyond International Services Ltd (4) Discovery Communications Inc [2006] EWHC 1242 (Ch)

The principles relating to costs capping orders laid down in King v Telegraph Group Ltd (2004) EWCA Civ 613 , (2005) 1 WLR 2282, a defamation case, were not applicable to all litigation. In the instant case the fact that the claimant was instructing solicitors under a conditional fee agreement without after the event insurance cover was not enough in itself to justify a costs capping order being made. The court would only consider making a costs capping order where it was established on evidence that there was a real risk of disproportionate or unreasonable costs being incurred and that risk could not satisfactorily be provided for by more conventional means, such as the usual costs assessment after the trial, Smart v East Cheshire NHS Trust (2003) EWHC 2806 (QB) , (2004) 80 BMLR 175 followed. It was the costs judge's role to filter out the sort of extravagant costs that had in some cases led to the making of a costs capping order. In the instant case, the fact that there was a CFA with a large mark-up, with no ATE cover, was not in itself enough to justify a costs capping order. The evidence showed clear suggestions of potentially extravagant costs expenditure, but that could be dealt with in the usual way be post-trial costs assessment.

Although the Court has power to make a costs capping order it will be a rare case outside the group litigation context where the Court will make such an order. The guidance in *Smart* should be considered before making any application.

ADR and Joint Settlement Meetings

Resolving a claim without proceeding to trial can of course save costs. If the Claimant is unwilling to participate in ADR then this should be raised on costs. The guidance in the following case should be considered:

Halsey v Milton Keynes General NHS Trust : Steel V (1) Joy (2) Halliday [2004] EWCA Civ 576

HELD: (1) The burden was on the unsuccessful party to show why there should be a departure from the general rule on costs in the form of an order to deprive a successful party of some or all of his costs on the grounds that he had refused to agree to alternative dispute resolution (ADR). The fundamental principle was that such a departure was not justified unless it had been shown that the successful party had acted unreasonably in refusing to agree to ADR. In deciding whether a party had acted unreasonably the court should bear in mind the advantages of ADR over the court process and have regard to all the circumstances of the particular case. Factors that could be relevant included (i) the nature of the dispute; (ii) the merits of the case; (iii) the extent to which other settlement methods had been attempted; (iv) whether the costs of ADR would be disproportionately high; (v) whether any delay in setting up and attending the ADR would have been prejudicial; (vi) whether the ADR had a reasonable prospect of success. Where a successful party had refused to agree to ADR despite the court's encouragement, that was a factor that the court would take into account when deciding whether his refusal was unreasonable. The court's role was to encourage not to compel ADR.

A party can only rely on without prejudice save as to costs offers or negotiations in a dispute on costs:

(1) Reed Executive Plc (2) Reed Solutions Plc V (1) Reed Business Information Ltd (2) Reed Elsevier (Uk) Ltd (3) Totaljobs.Com [2004] EWCA Civ 887

The claimants (RE) wanted to rely on "without prejudice" negotiations with the defendants in a dispute as to costs. HELD: (1) Negotiations on a "without prejudice save as to costs" basis were obviously admissible on that question (Calderbank v Calderbank (1976) Fam 73 ; Cutts v Head & Anor (1984) 2 WLR 349). By contrast, the negotiations in the instant case were on a completely "without prejudice" basis. The parties had done so in the faith and expectation that such negotiations could not be used against them even on the question of costs (Walker v Wilsher (1889) 23 QBD 335 applied). Although there were some exceptions to that rule, costs was not one of them (Unilever plc v Proctor and Gamble Co (2000) 1 WLR 2436 . The recent decision in Halsey v Milton Keynes General NHS Trust (2004) EWCA Civ 576, Times, May 27, 2004 did not abrogate from the rule in Walker (supra). Accordingly, it followed that the Court of Appeal could not order disclosure of "without prejudice" negotiations.

Also see *Jackson v MOD* above.

A Defendant should be wary of only making its best offer in without prejudice negotiations. If insurers are prepared to settle at a particular level in a settlement meeting then if the claim does not settle protect the position by a Part 36 offer.

Part 36 Offers/Payments

A separate talk on its own! As things stand (and changes to the rules are being considered) there would appear to be no advantage in making a payment into Court rather than a Part 36 offer that complies with the Court of Appeal's guidance. Offers are more flexible e.g. in respect to issues or conduct, and can be more easily withdrawn:

Trustees Of Stokes Pension Fund v Western Power Distribution (South West) Plc [2005] EWCA Civ 854

HELD: (1) The CPR provided that the court could order that an offer was to have the same costs consequences as a Part 36 payment into court but gave no guidance as to how the discretion to do so should be exercised. (2) An offer to settle a money claim should usually be treated as having the same

effect as a payment into court if the offer was expressed in clear terms, was open for acceptance for at least 21 days and otherwise accorded with the substance of a Calderbank offer, was a genuine offer and if the defendant was good for the money when the offer was made. To the extent that any of those conditions was not satisfied the offer should be given less weight than a payment into court for the purposes of a decision as to the incidence of costs. Where none of the conditions was satisfied it was likely that the court would hold that the offer afforded the defendant no costs protection at all, Amber v Stacy (2001) 1 WLR 1225, Maersk Columbo (2001) EWCA Civ 717, (2001) 2 Lloyd's Rep 275 and Crouch v King's Healthcare NHS Trust (2004) EWCA Civ 1332, (2005) 1 WLR 2015 considered.

Other recent cases where the effect of offers on the appropriate order has been considered by the Court of Appeal are:

Codent Ltd v Lyson Ltd [2005] EWCA Civ 1835

The appellant company (L) appealed against a costs order made in favour of the respondent company (C). C had issued proceedings against L for damages for breach of contract. L had denied liability and issued a counterclaim. After the trial on liability was fixed, L sent a Calderbank letter nominating a figure in full and final settlement, offering to waive its counterclaim amounting to 20 per cent less than the settlement figure, and to pay the costs of the action. C refused the offer and was successful in its claim, but to a lesser extent than that in L's offer. When assessing costs the judge ruled that L should get no benefit from its offer as (i) L could have made a CPR Part 36 payment into court; (ii) C had had no guarantee that it would receive payment; (iii) an unreasonably short period of time had been given for C to accept the offer. L argued that when assessing costs the judge had failed to give any, or any adequate, weight to its Calderbank offer.

HELD: The judge had based his decision on case-law current at the time, particularly Crouch v King's Healthcare NHS Trust (2004) EWCA Civ 1332 , (2005) 1 WLR 2015, considered. He had not had the benefit of the decision in Trustees of Stokes Pension Fund v Western Power Distribution (South West) Plc (2005) EWCA Civ 854 , (2005) 1 WLR 3595, applied. The judge had proceeded on the basis that either the offer had full effect or no effect at all. He had not considered whether an intermediate position was possible and so had erred in principle. As a result of that error, the costs order was manifestly unjust to L, who had made a clear offer in a sum substantially exceeding the amount C eventually recovered, and no benefit had been given for that fact. Account had to be taken of the fact that the offer had not been made more than 21 days before trial and that it had not been left open for 21 days. The right order in the light of the offer was that C should have 70 per cent of its costs of the action up to the first day of trial, and that L should have its costs thereafter.

Lilian Day v Philip John Day [2006] EWCA Civ 415

HELD: (1) The question of who was the unsuccessful party or the successful party to an action could be determined by who ultimately wrote the cheque at the end. There was no question in the instant case that that party was P. P had failed in the action and L had succeeded, more so by the fact that P had refused to pay L any money notwithstanding his fallback position in the proceedings. Accordingly, the ordinary rule that costs followed the event applied and there was nothing in the instant case to depart from that ordinary rule. The judge had therefore erred in the exercise of his discretion by concluding in effect that neither party had won. (2) The judge had also erred in concluding that neither party had made any offers to settle. The valuable use of payments into court and Part 36 offers placed an onus upon the defendant. P had the ability to make a payment into court based upon his fallback position, but he failed to protect his position. He had made an offer, but that offer had been substantially lower than the award made to L. The judge had fallen into error by not taking that matter into account. In the circumstances, the judge's exercise of discretion was flawed and L was awarded her cots of the action.

Additional Liabilities

There is little that the Defendant can do about a claim for additional liabilities until the assessment stage. As emphasised in *KU v Liverpool CC* [2005] EWCA Civ 475: "When a court has to assess the reasonableness of a success fee it must have regard to the facts and circumstances as they reasonably appeared to the solicitor at the time when the CFA was entered into (see para 11.7 of CPD and *Atack v Lee* [2004] EWCA Civ 1712)". It is though worth considering what the facts and circumstances would probably have been at that time.

With the advent of fixed success fees in large numbers of personal injuries cases, the level of which is determined by when the claim is settled hindsight is used. It is therefore always worth being aware in such cases that the additional liability will substantially increase at trial.

One other tactic worth considering is making a Part 18 request on the availability of BTE cover:

John Michael Hutchings v British Transport Police Authority CC (Central London) (Senior Costs Judge Hurst) 11/10/2006

H had sought damages for injury sustained in the course of his employment with B. The claim was settled, B agreeing to pay the costs. H's claim was funded under a conditional fee agreement which provided for a success fee of 75 per cent. B, as it was entitled to do, raised a large number of objections to the bill in its points of dispute, and thereafter served a Part 18 request, which asserted that it was designed to establish whether or not H had the benefit of legal expense insurance and to clarify the relationship between H's solicitors and the claims management company/insurance providers.

HELD: The starting point was the overriding objective, and in particular the requirement of proportionality. The extent of satellite litigation in relation to costs issues was well known, and the court would not wittingly do anything which was likely to promote further satellite litigation. A paying party had, however, to be in a position to understand the claim for costs being made against it, and was entitled to challenge items which it felt to be disproportionate or unreasonable. Cases to which the CFA Regulations did not apply might still be the subject of challenge, but if such a challenge was successful that would not result in the whole of the costs being irrecoverable. CPR r.44.15 required a party who sought to recover an additional liability to provide information about the funding arrangement to the court and to other parties. If the Costs Practice Direction was complied with, the further information that might legitimately be requested was (i) whether the receiving party had insurance; (ii) if so, with whom; and (iii) whether it had any legal expenses insurance. If the receiving party had complied with the requirements of the practice direction, the paying party ought to have sufficient information as to the policy in respect of which the premium was claimed, but that information would not reveal the existence or otherwise of any before the event policy. In the instant case, B was, to a very limited extent, entitled to further information. The questions which were reasonable and proportionate were those identified which concerned whether H had insurance, with whom, and whether he had any legal expenses insurance. It would, however, be disproportionate to allow any of the other questions contained in the Part 18 request for further information.

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