PERSONAL INJURY SEMINAR SERIES

PITFALLS IN COSTS CLAIMS

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Summary

This talk looks at recent developments in costs litigation and considers some of more problematic areas of the law. These notes are designed to provide more detail, for future reference, on the topics discussed at the talk. The topics to be covered are:

1. *Trafigura* and its implications
2. The Impact of the Jackson Report on CFAs and LEI
3. The RTA pre-action protocol, the RTA portal and fixed costs
4. Costs Estimates
5. Counsel's fees and expert's fees

Trafigura and its implications

On 12 October 2011 the Court of Appeal handed down its judgment in one of the largest and most significant costs cases in recent years, *Motto v Trafigura Ltd* [2011] EWCA Civ 1150; [2012] 1 WLR 657. The Court (Lord Neuberger MR, Maurice Kay and Hughes LJJ) decided nine appeals from the decision of the senior costs judge in an assessment of a costs bill totalling over £100 million.

Facts

The case arose out of an environmental disaste defendants, or their local contractors, allegedly dumped potentially toxic chemical waste at locations around Abidjan. Local inhabitants inhaled the fumes released by the chemicals. Their symptoms allegedly included headaches, eye, throat and skin irritation, respiratory diseases, nausea, vomiting, diarrhoea and even death. It was later acknowledged that the worst symptoms which could have been caused by the fumes were short-term, relatively mild flu-like symptoms and anxiety.

Leigh Day & Co represented the claimants, who eventually numbered 30,000, on conditional fee agreements with after-the-event legal expenses insurance. They brought proceedings in England in October 2006 and a Group Litigation Order was made in January 2007. They reached a settlement with the claimants of £30 million, without admitting liability. The defendants were to pay the claimants' costs on the standard basis and proportionate costs of which we obtaining ATE insurance.

The claimants lodged a bill of costs totalling nearly £105 million, including £49 million base costs, plus a 100% CFA uplift for solicitors and counsel and a £9 million ATE insurance premium. The senior costs judge decided a list of preliminary issues to determine how the detailed assessment would be conducted. His decision on nine of those issues was challenged in the Court of Appeal. The decision is particularly important on the issues of proportionality and the recoverability of the costs of litigation funding, but most of the issues discussed give useful guidance for future practice.

Proportionality

The costs judge had concluded that the base costs of £49 million had the appearance of being disproportionate, but when conducting the detailed assessment he would not be precluded from deciding that a particular item was, in fact, proportionate and therefore did not need to pass the test of necessity.

The Court of Appeal overturned this decision and held that an item in the bill of costs would only be allowed if it were necessary and that the bill would therefore be rendered proportionate by only allowing necessary items, and only in a reasonab

CPR 44.2(2)(a) provides that assessment on the standard basis only allows recovery of those items which are proportionate to the matters in issue. CPR 44.5 provides that:

> *(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. […]*
>
> *(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.*

The Court was to judge proportionality at the time when the CFA was entered, not with the benefit of hindsight or solely on the basis of the amount recovered: *KU v Liverpool City Council* [2005] EWCA Civ 475, [2005] 1 WLR 2657 at para. 20. However, in *Trafigura*, Lord Neuberger noted that the amount of damages actually recovered would be a significant factor. In particular, where it was

substantially lower than the amount claimed, this *might* (but will not always) raise questions as to whether the action was genuinely worth the amount originally claimed.

In *Home Office v Lownds* [2002] EWCA Civ 365, [2002] 1 WLR 2450, Lord Woolf CJ said (at paras. 3 and 8) that the requirement of proportionality is mandatory in all costs assessments (except those on the indemnity basis) and it was designed to encourage the parties to conduct the litigation proportionately. *Lownds* requires both a global approach and an item-by-item approach:

(i) the global approach examines the proportionality of the total sum claimed, having regard to the factors in CPR 44.5(3);

(ii) if the total sum is not disproportionate, then the court only needs to be satisfied that each item was reasonably incurred and at a reasonable cost;

(iii) if the total sum appears disproportionate, then the court will need to be satisfied that each item was necessary and, if necessary, that the cost was reasonable.

In *Trafigura*, the Court adopted this approach (and rejected approaches in other cases, which the costs judge had relied on). The *Lownds* approach means that where the total costs appear disproportionate, they are rendered proportionate by only allowing costs which were necessary, and in a reasonable sum. This approach was well understood and would promote consistency, and encourage discipline among lawyers when contemplating and engaging in litigation. (There have been suggestions, such as in the Jackson Report[1], that this approach is still too generous to claimants, and that proportionality should always prevail over reasonableness.)

The important points to note on proportionality are as follows:

(i) it must be applied in all costs assessments (except those on the indemnity basis);

(ii) it should be judged as at the time the solicitor entered into the CFA, not retrospectively and not solely on the basis of the amount recovered (although this will be a significant factor);

(iii) the proportionality of the total amounts of costs must be judged first, by the factors in CPR 44.5(3);

(iv) if the total amount is not disproportionate, each item only needs to have been reasonably incurred and in a reasonable sum;

(v) if the total amount appears disproportionate, then each item must have been necessary and, if so, in a reasonable sum;

(vi) this requires some discipline and planning at the outset and during litigation, to ensure that (a) the total costs do not become disproportionate, (b) unreasonable and unnecessary items are not incurred and (c) the sum paid for each item is reasonable.

[1] Sir Rupert Jackson, *Review of Civil Litigations Costs: Final Report* (2010), chapter 3, paras. 5.10-5.11, 5.16

Costs of funding

This issue was one of the most significant decided. It concerned the recoverability of work done by solicitors, counsel, costs draftsman and insurers in establishing the CFAs and ATE insurance premiums. The cost judge held that this work was recoverable.

The defendants argued on appeal that the costs of funding litigation was not recoverable, relying on *Hunt v Douglas Roofing* (1987) 132 Sol Jo 935, (1988) Costs LR (Core) 136. In that case it was held that the costs of funding (in that case, interest paid on money bor not recoverable under the old Rules of the Supreme Court. It was held that this applied equally under the CPR (although there is a specific right under the CPR to interest on costs).

The Court distinguished this exact case, but st funding. Its reasons for doing so are worthy of note:

(i) interest on borrowed money and costs incurred in connection with CFAs are both attributable to the litigant's need to fund the litigation

(ii) the time and expertise spent in identifying potential claimants and negotiating terms on which they would instruct the solicitors could not be an item incurred by the client for the purposes of the litigation;

(iii) the potential claimants only became the sol the time spent advising on the CFA was n solicitors'. Similarly, vices would not charge his customers for advising on the terms on which he provided goods or services; provi

(iv) even if solicitors did charge for that advice, it was not given to a person who, at the time of the advice, was a party to the proceedings, and therefore was not recoverable from the defendant;

(v) such advice (and similar costs of presenting to potential clients, advertising to the public and so forth) had to be seen as part of the

(vi) solicitors are required by the Code of Conduct[2] to advise on funding arrangements. It was finely balanced whether the solicitor could charge for that advice;

(vii) ultimately, the Court noted that solicitors could not recover costs of setting up funding from the Legal Services Commission and it considered that the costs of setting up CFAs was analogous and thus not recoverable;

(viii) similarly, the costs in referring clients instructions were also not recoverable, since they were collateral to the litigation.

This decision could have wide-reaching consequences. Given solicitors' obligation to ad terms of a CFA, there will always some time on this in every case and it will be significant in group litigation. These costs will now have to be built into a firm's general overheads, wh have a significant impact on firms which undertake a large amount of CFA work.

[2] Solicitors Regulation Authority, Code of Conduct 2011, section 1, IB 1.17

Abandoned claims

The claim alleged that the claimants had suffered serious injuries, including loss of visual acuity, miscarriage, childbirth deformity, gynaecological problems, anaemia, memory problems, and even death. These injuries were far more severe that the mild flu-like symptoms which formed the basis of the eventual settlement. The claimants did not formally abandon the claims for other injuries, but they effectively disclaimed them by agreeing to the settlement. The costs judge held that the claimants could recover reasonable and proportionate costs of investigating these other claims and injuries, even though they were disclaimed in the settlement.

The Court of Appeal held that the defendants had agreed that the claimants could recover their costs on the standard basis, but the defendants could still challenge the costs of the abandoned claim – the court has power to deprive a successful claimant of the costs on an issue as to which he has failed.

However, as a matter of principle in the preliminary issues, the claimants were entitled to recover the reasonable and proportionate costs of investigating other injuries, even ones which were not included in the final terms of the settlement. solicitors to have pleaded every symptoms reported by a claimant to the local representative, unless it appeared fanciful or there was some special reason not to plead it. The costs could be recovered up to the point that the costs judge considered that it became unreasonable and disproportionate to continue investigating a certain type of injury.

The important points are as follows:

(i) a claim for a particular injury is not abandoned just because a settlement is reached only on other, less serious injuries;

(ii) a claimant can therefore recover reasonable and proportionate costs for investigating that more serious injury;

(iii) on assessment, the court can find that there is a point, after which it became disproportionate to continue investigating this particular injury (for instance, in light of the difficulty in proving causation).

Vetting costs

This issue referred to the costs incurred in identifying potential claimants, interviewing them, assessing their claims and then agreeing a CFA with them. Their solicitors employed agents in Côte d'Ivoire, who would receive 3% of the damages representatives in communicating with the claimants on behalf of their solicitors.

The costs judge decided that the claimants could recover their reasonable and proportionate costs associated with the collection, assessment and management of their claims. For the period prior to the agreeing of the CFA, the recoverability depended on whether the CFA ran from the date when the claimant first instructed their solicitors, or from the date the agreement was entered into (which would cover the meeting immediately prior to signing the agreement). The Court of Appeal upheld his conclusions. It rejected the defendants' ar

was 'generic costs' and not attributable to any
for the benefit of all the claimants..

The following points arise out of this issue:

(i) it is noteworthy that the use of foreign representatives, who would take a percentage of the damages recovered, was not considered objectionable and did not raise issues of champerty or maintenance, which it might still do had they been located in England;

(ii) management and administration of group litigation can be recoverable, even if some of the costs are 'generic' to all claimants, proportionate;

(iii) where there are significant costs incurred prior to the entry into a CFA, for these costs to be recoverable under the CFA, the CFA needs to apply to the period from the date the client first instructs the solicitor, not just from the date of the signing of the agreement.

Pre-action conduct

The defendants argued that the claimants had wasted costs by issuing their claim precipitously, without following the pre-action protocol. The costs judge rejected this since there was no evidence that the failure to follow the pre-action protocol had any significant effect on the level of the claimants' costs. The Court of Appeal agreed wit

It noted that their solicitors had to be quick in issuing, since a rival firm in the Netherlands was about to issue proceedings against one of the Trafigura companies registered there. Their solicitors honestly and reasonably believed it was -in thei interest in the matter (since they would obviously profit from it too) did not invalidate the point. The Court also noted that the claimants had followed the spirit of the pre-action protocol, by agreeing a stay of the proceedings for as long as the defendants wanted, while the terms of the Group Litigation Order were agreed and providing the defendants with evidence as soon as it was obtained. The Court found that their solicitors did not fall very far short of their duty regarding pre-action conduct and it did not incur any extra costs. If, on the detailed assessment, any particular item was found to be unnecessarily incurred by the early start to proceedings, then the defendants could argue about it.

This relevant points from this issue are:

(i) a failure to follow the pre-action protocol is only relevant where it leads to additional costs being incurred – the Court's sanction is to disall the claimant in other ways;

(ii) where proceedings need to be issued quickly (most commonly, due to an approaching limitation deadline), the claimant should try to follow the spirit of the pre-action protocol, such as by agreeing a stay of proceedings and exchanging information with the defendant.

Medical reports

The costs judge decided that the claimant could recover costs associated with medical reports, such as the costs of instructing the doctors, drafting the reports and other relevant administration costs. But this excluded the costs of training the doctors (as opposed to supervising them), the costs of amending defective reports and defective translations of reports. The Court of Appeal held that the judge was entitled to reach these conclusions.

This is a useful indication of what ancillary costs for medical evidence are recoverable. It seems that the distinction is between the costs reasonably needed to obtain the medical report, as opposed to costs which are not reasonable or necessary for the case (such as the cost of training doctors, it being assumed that doctors are already trained) or not reasonably incurred (such as for costs wasted because of defective reports).

Settlement and distribution

Given the number of claimants involved, their solicitors incurred significant costs in administering and distributing the settlement money amongst t required them to have security protection when travelling around the country. The costs judge allowed these costs (except for the costs incurred by counsel in travelling there, since he did not see why counsel's attendance was necessary) costs were The de recoverable in principle, but disputed them on the terms of the particular settlement.

The Court of Appeal confirmed that (subject to proportionality and reasonableness) these costs are recoverable, since they are part of the costs of proceedings. It cited two cases in support. *Krehl v Park* (1875) 10 Ch App 334 at 337 and *Copeland v Houlton* [1955] 1 WLR 1072, which indicated that recoverable costs could include work necessary to give effect to a compromise agreement.

In an ordinary case, these costs are unlikely to be particularly large – but are more relevant in group litigation or cases involving foreign claimants. The decision on this issue is useful confirmation that the costs are recoverable in principle, subject as always to proportionality and reasonableness.

Success fee

The costs judge assessed the success fee for solicitors and counsel at a uniform 58%, since he did not consider that the risk assessment undertaken by 100%. The Court of Appeal upheld this decision. It noted that the reasonableness of the size of the success fee must be judged as at the time when the CFA was entered into and subsequent events should not influence the decision: *KJ v Liverpool*, para. 20.

The claimants' solicitors and counsel had assessed their prospects of success at 50% (meriting a 100% uplift) and pointed to a number of factors counsel's advice, the assessment contained in the conceded that the or latter helped their case that the prospects were much better than 50% and also pointed to public

statements made by the claimants' solicitors ab
the ATE insurers' assessments.

The Court took a number of factors into account, i
were better than the assessment of 50% reached by their solicitors and counsel (and, hence, the
case merited a lower uplift) and that as the case progressed, upheld
the prospects became better and the claimants'
chance of an early settlement.

The Court noted that prospects of success cannot be evaluated precisely, despite being expressed in
figures. The solicitors' figure of 50% differe
prospect of success, which determined the level
opinion may naturally have been cautious and more pessimistic of the prospec
solicitors' were more optimistic in their discus
these significant. The Court was less convinced of the relevance of public statements of confidence
by the claimants' solicitors. The Court found that the
basis of the evidence and, although he was not bound to do so, he was entitled to set the same fee
for both solicitors and counsel.

There are a number of important points to note:

(i) the reasonableness of the success fee should be judged at the time when the CFA was entered into, not with the benefit of hindsight;

(ii) the Court can look at privileged document correspondence when assessing prospects of success in a complex case;

(iii) in particular, there may be some tension b about the prospects of success for the purposes of obtaining ATE insurance and his and counsel's instructions when advising the client, cautious w

(iv) it is possible to argue for different levels of success fee to reflect the risk at a particular stage in the litigation (whether diminishing or increasing), or different risks for solicitors and counsel.

Conclusion

Trafigura is one of the most important costs decisions in recent years – not because it is a radical change in the law, but because it authoritatively affirms and restates some key principles in costs claims. It also decides some smaller points which often arise but which had not been authoritatively decided, because the sums involved are rarely large enough to merit an appeal. A bill of costs of this size was of the few opportunities for these points to be considered by the Court of Appeal.

Its most significant implications are likely to be:

(i) affirming that proportionality lies at the centre of all costs decisions (on the standard basis) and explaining the approach: (a) considering the proportionality of the total costs and (b) then the proportionality of each item;

(ii) deciding that the costs of litigation funding (time spent advising on CFAs and negotiating with ATE insurers) were not recoverable;

(iii) deciding which ancillary costs are recoverable for medical reports;

(iv) deciding that generic administration costs are allowed for group claims;

(v) confirming that the costs of settlement and putting a settlement into effect are recoverable;

(vi) confirming that the reasonableness of success fees should be judged as at the time of entering into the CFA, not with hindsight;

(vii) providing guidance on the costs of 'abandoned claims' if a settlement is reached only on lesser injuries;

(viii) providing guidance on the limits of the costs consequences for a failure to follow the pre-action protocol.

However, this restates the current law, which could well change in light of the proposals made in the Jackson Report, discussed below.

Impact of the Jackson Report on CFAs and LEI

Sir Rupert Jackson's report on civil costs was published in November 2009 and the Ministry of Justice published the government response on March 2011. Despite the huge changes this will mean to civil funding, especially in PI cases, few have recalibrated their business model to deal with the alterations the new system will inevitably cause.

The bill that will enact Jackson's recommendations is the Legal Aid, Sentencing and Punishment of Offenders Bill ('LASPO'). The sections relating to costs have been subject to significant amendment and now are awaiting a third reading in the House of Lords.[3] Cook in his 12th edition on costs estimates that all the Jackson recommendations that have been adopted by the government will be in force by way of legislation or judicial decision by 1 October 2012.[4]

The main amendments proposed by Jackson will be enacted by LASPO, ss. 46-48, which will amend Courts and Legal Services Act 1990, s. 58 (in particular s. 58A, AA & C) and by s. 56 (offers to settle).[5] It is likely that the amendments proposed by the House of Lords before the Third Reading will very closely resemble what will be enacted.

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[3] Legal Aid, Sentencing and Punishment of Offenders Bill, available at: http://services.parliament.uk/bills/2010-12/legalaidsentencingandpunishmentofoffenders/documents.html

[4] See 12th edition of Cook on costs and in particular his appendix on the Jackson report.

[5] The most up-to-date amendments are available at: http://www.publications.parliament.uk/pa/bills/lbill/2010-2012/0135/2012135.i-vii.html

Given the bill still awaits its third reading in the House of Lords and royal assent, it is easiest to summarise the impact of the Jackson reforms as follows:

(i) abolition of general recoverability of CFA success fees from the losing side.[6] It is hoped that by making the CFA funded party pay the success fee that there will be an incentive to keep litigation costs down. This is intended to mirror the situation when CFAs were introduced;

(ii) abolition of the recoverability of ATE premiums (following the same principle as set out above);

(iii) the introduction of damages based agreements (or contingency fees) with a cap of 25% recoverability from damages (not including future care and other losses), which will become CLSA, s. 58AA.

Many of the figures will be introduced by way of secondary legislation and the Ministry of Justice response will be a good indication of what any cap shall be and government legislative intention.

In order to protect claimants who have lesser funds than often well resources defendants, a system of 'Qualified One Way Costs Shifting' will be us of paying the defend a*unless* their behaviour is thought to be fraudulent, claim f frivolous or unreasonable[7] *or* in instances where the claimant has resources.[8]

No doubt the government will rely on the ECHR case of *MGN v UK* [2011] ECHR 39401/04 which stated that without a reasonable success fee reg rights (freedom of speech). However, one must question the reforms as part of a general programme of austerity favoured by the current government.

Where next?

There will be a drive to reduce costs under CFA arrangements as claimants will have to bear the burden of these costs. It will therefore be sensible for solicitors to keep their clients updated on a regular basis as to costs being incurred and the reason for this. Similarly it is hoped that changes in the ATE funding arrangements will lead to a depression of these premiums. Failure of insurers to adopt this approach it is hoped will make their product uncompetitive and potentially unmarketable.

One of the biggest changes will be the introduction of the American system of contingency fees. It seems likely that this will lead to class actions on a wider scale as this will become a more profitable avenue for claimant solicitors.

[6] Of the 556 formal responses to the government's cons 29% agreed. Most of the support for this proposal was from Defendant interest groups (insurers, businesses, Local Authorities etc).

[7] It is anticipated that 'unreasonable' behaviour will

[8] Again what constitutes resources? Will this entitle Defendants to pursue Claimants with a home?

Claimant solicitors should also receive some assurance from LASPO, s. 56 which will penalise defendants if they fail to beat an advantageous offer. The amount suggested in the MoJ response was 10%. In essence this aims to give Part 36 extra bite and to discourage unnecessary hearings.

In summary, while the aims of the current government are clear, like all legislation it will take time to evaluate whether its impact will be the intended one.

RTA pre-action protocol, the RTA portal and fixed costs

The RTA portal is an online system which manages the exchange of information between claimants and defendants in personal injuries from road traffic accidents valued at between £1000 and £10,000.[9] It supplements the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol').[10]

The defined aims of the RTA Protocol are:

(i) the defendant pays damages and costs using the process set out in the Protocol without the need for the claimant to start proceedings;
(ii) damages are paid within a reasonable time; and
(iii) the claimant's legal representative receiv
this Protocol.[11]

The Protocol sets out the applicable pre-action conduct in three stages. The stages work as follows.

Stage 1: providing early notification of claims to defendants and insurers [12]

(i) The claimant's solicitors send nically to the defendant's insurers. tol the claim noti

(ii) Note that where the insurer considers that inadequate mandatory information has been provided in the CNF, this is a valid reason for the defendant to decide that the claim should not proceed under the Protocol.

(iii) The insurers acknowledge receipt of the CNF.

(iv) The insurers then have 15 days to respond (ex
days).

(v) Where liability is not admitted or the insurer alleges contributory negligence (except for a failure to wear a seat belt), the claim will no longer continue under the Protocol and the claimant can issue proceedings (under CPR Part 7).

(vi) Where liability is admitted, the costs for this stage are fixed at £400. A success fee of 12.5% is applied to stage 1 costs, but is only payable at the end of stage 2.

[9] The RTA Portal is located at: www.rtapiclaimsprocess.org.uk.
[10] The RTA Protocol is located at: www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_rta
[11] RTA Protocol, paragraph 3.1
[12] *Ibid.*, paragraph 6

Stage 2: medical evidence, offers to settle and negotiation [13]

(i) The claimant obtains a medical report, which should be checked for accuracy. Additional reports from can be obtained where the initial medical expert considers this necessary.

(ii) The claimant can request an interim payment of £1000 by using the Interim Settlement Pack.

(iii) The defendant must make the interim payment within 10 days.

(iv) Where the claimant requests an interim payment of more than £1000, the defendant should pay it, or explain why it disputes the amount over £1000 is payable.

(v) The claimant should send the defendant the Stage 2 Settlement Pack, including medical reports and evidence of pecuniary loss and disbursements.

(vi) The defendant has 15 days to consider this Pack and make an offer (and, for a failure to wear a seat belt, suggest an appropriate percentage reduction in damages).

(vii) A further 20 days is allowed for negotiation, and can be extended by agreement.

(viii) A settlement involving a child or protected party must be approved by the court.

(ix) Where a settlement is reached on Stage 2, the fixed costs are £800. A success fee of 12.5% is applied to these costs.

Stage 3: Part 8 claim where quantum is not agreed [14]

(i) Where quantum cannot be agreed, it is determined by the court as a modified CPR Part 8 claim, governed by Practice Direction 8B.

(ii) The claimant must send the defendant the Court Proceedings Pack, parts A and B. Part A includes the claimant's schedule of loss and final offer and counter-offer on quantum.

(iii) An application is made to court under the modified Part 8. The practice direction, paragraph 6, sets out the documents to be filed with the claim form.

(iv) The claimant can request that the case is determined on the papers or at an oral hearing.

(v) Following the court's decision, the fixed cos and £500 for an oral hearing.

(vi) A success fee of 100% is applied to these costs when the claim ends at a hearing which the claimant wins. The success fee is 12.5% where settlement is reached before the hearing.

[13] *Ibid.*, paragraph 7

[14] The Stage 3 procedure is set out in CPR Practice Direction 8B

Costs implications of the RTA Protocol

The RTA Protocol involves most of the work done in any other fast track PI case, but limits the recoverable costs quite significantly. The theory seems to be to encourage a quick settlement. The major advantage for claimant is that they will receive compensation much more quickly than under normal court proceedings. Claimants are also pressed into settling to avoid the process continuing for too long and incurring additional, irrecoverable costs. Defendants have an incentive to settle because they would have to pay lower costs under the Protocol than in a normal Part 7 claim.

Once a claim is started using the RTA Protocol (via the online portal), the claimant can only discontinue the Protocol only for specific reasons, or else he or she will face costs consequences.

The claimant can discontinue the Protocol process (and can bring proceedings under Part 7) for the following reasons:

(i) the claim has been re-valued at greater than the limit of £10,000: paragraph 4.2;

(ii) the defendant denies liability or alleges contributory negligence (other than for a failure to wear a seat belt): paragraph 6.15;

(iii) the defendant fails to pay stage 1 costs: paragraph 6.19;

(iv) the defendant has not complied with the provisions on interim payments (in paragraphs 7.13 and 7.14) or the claimant is dissatisfied with the amount of the payment: paragraphs 7.21 – 7.22;[15]

(v) the defendant claims that the small claims track is the proper track for the claim or withdraws the admission of causation: paragraph 7.32;

(vi) the defendant has not responded within the initial consideration period (or within a period extended by agreement): paragraph 7.33;

(vii) a party has withdrawn an offer made in the Stage 2 Settlement Pack Form after the consideration period has expired: paragraph 7.39;

(viii) where original damages are agreed, but additional damages are not: paragraph 7.50;

(ix) where the defendant does not pay stage 2 costs specified in paragraphs 7.61 – 7.62 (or comply with various other provisions): paragraph 7.66;

Other than those reasons, the claimant will face costs consequences for failing to comply with the Protocol or leaving the Protocol early. These are set out in CPR 45.36:

(1) This rule applies where the claimant –

(a) does not comply with the process set out in the RTA Protocol; or

[15] Where the claimant is a child, he or she must apply for an interim payment at court, without leaving the Protocol processes and, in this case, there are no costs consequences: paragraph 7.19

(b) elects not to continue with that process,

and starts proceedings under Part 7.

(2) Where a judgment is given in favour of the claimant but –

(a) the court determines that the defendant did not proceed with the process set out in the RTA Protocol because the claimant provided insufficient information on the Claim Notification Form;

(b) the court considers that the claimant acted unreasonably –

(i) by discontinuing the process set out in the RTA Protocol and starting proceedings under Part 7;

(ii) by valuing the claim at more than £10,000, so that the claimant did not need to comply with the RTA Protocol; or

(iii) except for paragraph (2)(a), in any other way that caused the process in the RTA Protocol to be discontinued; or

(c) the claimant did not comply with the RTA Protocol at all despite the claim falling within the scope of the RTA Protocol;

the court may order the defendant to pay no more than the fixed costs in rule 45.29 together with the disbursements allowed in accordance with rule 45.30 and success fee in accordance with rule 45.31(3).

(3) Where the claimant starts proceedings under paragraph 7.22 of the RTA Protocol and the court orders the defendant to make an interim payment of no more than the interim payment made under paragraph 7.14(2) or (3) of that Protocol the court will, on the final determination of the proceedings, order the defendant to pay no more than –

(a) the Stage 1 and 2 fixed costs;

(b) the disbursements allowed in accordance with rule 45.30; and

(c) a success fee in accordance with rule 45.31(3).

Essentially, claimants who fail to follow the Protocol or discontinue it early are restricted to the fixed costs under the Protocol and any additional costs incurred would not be recoverable.

The future

There has been talk from the Government of reducing the available costs yet further, from a maximum of £1200 to as little as £300.[16] In theory this is designed to reduce the number of fraudulent claims, which are notified via the portal but then not issued in court. However, £300 will probably leave solicitors with no money after their running costs are considered. Stage 2, for

[16] 'Fraud fears over RTA portal fee cap', *Law Society Gazette*, 29th March 2012, available at www.lawgazette.co.uk/news/fraud-fears-over-rta-portal-fee-cap

instance, involves on average five-and-a-half hours of work, for which £300 hardly seems sufficient compensation.

Costs Estimates

The rules governing costs estimates are set down in CPR Practice Direction 43 (otherwise known as 'The Costs Practice Direction') at section 6.

In the interests of completeness, relevant sections are out below (all sections in bold are our emphasis):

Paragraph 6.2

(1) In this Section an 'estimate of costs' means –

(a) an estimate of costs of –

(i) ***base costs***[17] *(including disbursements) already incurred; and*

(ii) ***base costs*** *(including disbursements) to be incurred,*

which a party, if successful in the proceedings, intends to seek to recover from any other party under an order for costs; or

(b) in proceedings where the party has pro bono representation and intends, if successful in the proceedings, to seek an order under section 194(3) of the Legal Services Act 2007, an estimate of the sum equivalent to –

(i) the base costs (including disbursements) that the party would have already incurred had the legal representation provided to that party not been free of charge; and

(ii) the base costs (including disbursements) that the party would incur if the legal representation to be provided to that party were not free of charge.

('Base costs' are defined in paragraph 2.2 of this Practice Direction.)

(2) A party who intends to recover an additional liability (defined in rule 43.2) need not reveal the amount of that liability in the estimate.

Paragraph 6.3

The court may at any stage in a case order any party to file an estimate of costs and to serve copies of the estimate on all other parties. The court may direct that the estimate be prepared in such a way as to demonstrate the likely effects of giving or not giving a particular case management direction which the court is considering, for example a direction for a split trial or for the trial of a preliminary issue. The court may specify a time limit for filing and serving the

[17] Defined as *'costs other than the amount of any additional liability'* as per paragraph 2.2

*estimate. However**, if no time limit is specified the estimate should be filed and served within 28 days of the date of the order**.*

Paragraph 6.4

(1) When –

> *(a) a party to a claim which is outside the financial scope of either the small claims track or the fast track files an allocation questionnaire; or*
>
> *(b) a party to a claim which is being dealt with on the fast track or the multi-track files a pre-trial check list (listing questionnaire),*

that party must also file an estimate of costs and serve a copy of it on every other party, unless the court otherwise directs. Where a party is represented, that party's legal representative must in addition serve a copy of the estimate on that party.

(2) Where a party who is required to file and serve a new estimate of costs in accordance with Rule 44.15(3) is represented; and the legal representative must in addition serve the new estimate on that party.

(3) This paragraph does not apply to litigants in person.

Paragraph 6.5

*An estimate of costs should be substantially **in the form illustrated in Precedent H** in the Schedule of Costs Precedents annexed to the Practice Direction.*

Paragraph 6.5A

*(1) **If there is a difference of 20% or more between the base costs claimed by a receiving party on detailed assessment and the costs shown in an estimate of costs filed by that party, the receiving party must provide a statement of the reasons for the difference with his bill of costs**.*

(2) If a paying party –

> ***(a) claims that he reasonably relied on an estimate of costs filed by a receiving party; or***
>
> ***(b) wishes to rely upon the costs shown in the estimate in order to dispute the reasonableness or proportionality of the costs claimed,***

***the paying party must serve a statement setting out his case in this regard in his points of dispute**.*

('Relevant person' is defined in paragraph 32.10(1) of the Costs Practice Direction)[18]

[18] The White Book (2012 edition), vol. 1, p. 1483

Paragraph 6.6

(1) On an assessment of the costs of a party, the court may have regard to any estimate previously filed by that party, or by any other party in the same proceedings. ***Such an estimate may be taken into account as a factor among others, when assessing the reasonableness and proportionality of any costs claimed****.*

(2) In particular, where –

(a) ***there is a difference of 20% or more between the base costs claimed by a receiving party and the costs shown in an estimate of costs filed by that party; and***

(b) it appears to the court that –

(i) the receiving party has ***not provided a satisfactory explanation*** *for that difference; or*

(ii) ***the paying party reasonably relied on the estimate*** *of costs;*

the court may regard the difference between the costs claimed and the costs shown in the estimate as evidence that the costs claimed are unreasonable or disproportionate.

There are several points to note:

(i) that any estimate only deals with base costs and not any uplift from a CFA arrangement. In practice when you have notification of a CFA funding arrangement on the other side it is best to assume a 100% uplift, unless it falls under the fixed costs regime;

(ii) there is no bar on providing a revised estimated costs schedule if the costs estimate becomes superseded by events. This is advisable to avoid being caught by the provisions in paragraph 6.5A and 6.6.

As a general rule it is advisable that all costs estimates provided to the other side are accurately worked out (including at allocation stage if possible), which will reduce the opportunity for opponents to attack any figures provided.

The Court of Appeal provided further guidance on costs estimates in the case of *Leigh v Michelin Tyre plc* [2003] EWCA Civ 1766. Dyson LJ said:

We accept, of course, that it will not always be possible at the allocation questionnaire 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 becomes clear during the course of the litigation that the estimate was inaccurate, it is all the more important to comply with the obligation in paragraph 6.4(2) of the Costs Practice Direction to file an updated estimate at the listing questionnaire stage.

He then went on to say:

The judge questioned the purpose of the provision of costs estimates. As we have said, it is to enable all parties to the litigation to know what their potential liability for costs may be. That enables them to decide whether to attempt to settle the litigation, or to pursue it, and (in the

latter case) what resources to apply to the litigation. But at least as importantly, it also enables the court to take account of the likely costs in determining what directions to give. In so far as the judge was suggesting that costs estimates are unnecessary, and will merely add to the costs of the litigation, he was wrong to do so. The practice direction is expressed in clear mandatory terms: costs estimates must be provided.

It is important to note that paragraph 6.6 does not seek to penalise parties for inaccurate estimates. If a paying party wishes to rely on the discrepancy between the estimate(s) and the final bill, they must prove *reliance* on the estimate. Further, as the extract above shows, estimates can be a useful indicator of how the case should be managed.

There is also provision for cost capping orders under CPR 44.3(6) but these orders are not commonly utilised in 'run of the mill' cases and even in Judges to resort to this. Namely where there are funding issues, then arguments over access to a fair hearing can be made.

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Counsel's fees have to be justified not just by year of call but the level of Counsel which the case merited. In very small matters it may be argued that it was not necessary to have instructed Counsel at all. However, if there is attendance at court it is often easy to argue that as junior Counsel travelling time that they are a cost effective option. Fast track brief fees should be uncontroversial as they are fixed by CPR 46.2 and there is a table setting the four grades out.

Other than experience, the court is entitled to look at what work the brief fee and any refreshers are intended to cover. Large cases often involve client conferences and the discussion of tactics which are over and above court preparation and witnes normally expected to include final submissions whether written or oral.

The Senior Courts Costs Office does produce figures for hearings for an hour and up to half a day in the Queen's Bench and Chancery D+ up to 5 years call, 5- They w 10 years call and a junior of 10 or more years. This is reproduced in texts such as *Cook on Costs*[19]

Charging for other work

Sir Thomas Bingham MR (as he then was) issued *Practice Note (Barrister: Fees)* [1994] 1 WLR 74 which stated:

1 Counsel's brief (or, where appropriate, refresher) fee includes — (a) remuneration for taking a note of the judgment of the court, (b) having the note transcribed accurately, (c) submitting the note to the judge for approval where appropriate, (d) revising it if so requested by the judge, and (e) providing any copies required for the Court of Appeal, instructing solicitors and

[19] E.g. p. 390 of the 2011 edition

lay client. Accordingly, save in exceptional circumstances, there can be no justification for charging any additional fee for such work.

2 When required to attend on a later day to take a judgment not delivered at the end of the hearing, counsel will, subject to the rules of the court, ordinarily be entitled to a further fee for such attendance. This note is not intended to affect that entitlement.

Further, courts are usually reluctant to award an additional amount for written submissions that were not part of the brief fee and refreshers. There are some situations where the case is to be regarded as sufficiently complex or exceptional for written submissions to attract extra and for a separate fee to have been agreed in respect of this. If there is an extra charge, then this will have to be justified by the receiving party to the court and the paying party.

When is a brief fee incurred?

In *Miller v Hales* [2006] EWHC 1717 (QB) Jack J gave direction on when a brief fee can have been said to have been incurred:

The old, the very old, rule was that when a brief was delivered the full fee was payable whatever happened thereafter. Many years ago it became common for agreement to be reached between solicitor and counsel's clerk in large cases as to the dates at which proportion of the brief fee would become payable in advance of the trial. There are two elements to be reflected there: the work counsel will put in on the brief as the trial approaches – which I would regard as the main element, and the fact that counsel has been booked for the trial and so will have a gap in his diary if the case settles, which may be difficult to fill at short notice. I would not expect today that, where no particular terms had been agreed, counsel would require to be paid his full brief fee where the brief had been delivered well in advance of the trial and the case settled soon after delivery. In short it is today appropriate to take a realistic and practical approach rather than to apply rigidly the old rule that a brief fee becomes payable on delivery of the brief. That should also be my approach to the circumstances here.

It is of more assistance to the court if a specific agreement on the date of incurring the brief fee can be pointed to or tranches, if that is appropriate. Written evidence of this (perhaps a short telephone attendance note) would be good evidence for these purposes. Otherwise, when a case settles at court or on the day before the hearing there should be no disallowance of any part of the brief fee as you would expect if a case settles early (see *London & Oriental Homes Ltd v Hope*, 11 December 2007, unrep., Lewison J)

In the interests of completeness, a solicitor has a duty to their client to challenge any brief fees that they consider to be unreasonable. This must be done within 3 months of receipt of the fee note and should arise from a dispute about competence or quantum.

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CPR 35.4(4) gives the court discretion as to the costs of the claim that may be recovered from any other party. In exercising this discretion, the court must have regard to the normal costs rules including CPR 44.3(4)(a) (the conduct of the parties) which is defined at CPR 44.3(5) as:

> *(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction (Pre-Action Conduct) or 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*.

The court may also be governed by what is proportionate. In *Kranidotes v Paschali* [2001] EWCA Civ 357, an expert who quoted a fee of £75,000 to value a shareholding of £10,000 was deemed disproportionate and the court ordered that another expert should be instructed.

It is accepted that cancellation fees may be appropriate as in *Martin v Holland & Barrett* [2002] 3 Costs LR 530 when an expert was held to be entitled to cancellation fees when the matter settled 12 days before trial and he had been called to give evidence.

SARA IBRAHIM

ALEXANDER HALBAN

3 Hare Court

11 April 2012

SARA IBRAHIM

Year of call: 2006

Main Practice Areas

- Commercial and Business Law
- Employment
- Personal Injury
- Insolvency and Restructuring

Profile

Sara's practice is focused on employment law, representing both employers and employees in the whole spectrum of employment issues and including claims involving unfair dismissal, redundancies, constructive dismissal and sex discrimination. She has experience of multi-day tribunal cases, and of interim applications and procedural hearings. Her experience encompasses advisory work as well as advocacy. She undertakes pro bono work in the areas of employment and social security law and is a qualified representative in Employment for the Free Representation Unit.

Her commercial experience includes proceedings in bankruptcy, Consumer Credit Act proceedings and multi-track cases, including issues of fraud and unjust enrichment. She has gained experience in the High Court, including in applications for security for costs.

Personal Injury work is a major focus for Chambers and Sara has significant experience in this area. She undertakes both defendant and claimant work, and her experience includes claims arising from liability and unlawful arrest. Sara is a member of our specialist 'Travel' group and overseas accidents.

Sara recently gained valuable experience from a part-time secondment to the Personal Injury department of a major law firm.

Sara was awarded scholarships by Lincoln's Inn and was a Hardwick Entrance Scholar.

Lectures and Publications: Sara contributes to Chambers client bulletins.

Memberships: COMBAR; LCLCBA; PIBA; ELBA; ELA

Qualifications: BA (History) Fitzwilliam College, Cambridge

ALEXANDER HALBAN
Year of call: 2009
Main Practice Areas

- Civil Liberties and Human Rights
- Commercial and Business Law
- Employment
- Personal Injury
- Insolvency and Restructuring
- Professional Negligence/Indemnity
- Travel Litigation

Profile

Alexander acts in a wide range of civil and commercial matters. He has experience of appearing in trials and applications in the county courts, including in contract, negligence and overseas travel claims. He has also appeared in hearings in the High Court in insolvency cases.

Recently he was instructed on a two-week High Court commercial trial, led by Thomas Roe, in a case concerning the breach of a partnership agreement to operate an oil and gas pipeline contract for BP in Azerbaijan and Georgia (Barber and Jangra v Rasco and Rassouli).

Alexander is happy to accept instructions t practice. He has a particular interest in civil liberties and human rights. Before pupillage, he worked at the European Human Rights Advocacy Centre, an NGO representing applicants from Russia at the European Court of Human Rights. He also worked as a research assistant to Professor Philip Leach on the third edition of his book, 'Taking a Case to the European Court of Human Rights'. During pupillage he assisted on an application to the ECHR on the right to a fair trial, arising out of a high-profile libel case.

Alexander also has a strong interest in cases with an international element, particularly from Russia and the former Soviet Union. He speaks and reads Russian fluently and is looking to use his Russian where possible in his practice. He has experience of other legal systems, having worked as a foreign law clerk to the President of the Supreme Court of Israel, Dorit Beinisch. In this role, he wrote memoranda on relevant English law to assist the Court with the comparative law sections of its judgments. During pupillage he assisted with research and drafting on constitutional, civil and criminal appeals to the Privy Council from a number of Caribbean jurisdictions.

Alexander won second prize in The Times Law Awards 2009 with an article entitled 'Should people in the public eye have a right to privacy?'

Scholarships: Queen Mother Scholarship (Middle Temple)
Qualifications: BA Modern History and Russian (Fi Oxford; Graduate Diploma in Law (Commendation), City Law School; Bar Vocational Course (Outstanding), City Law School.

Languages: Russian (including study at the State University of St. Petersburg, Russia); French.

3 HARE COURT

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- Commercial and business law
- Constitutional law and judicial review
- Defamation
- Employment
- Insolvency and restructuring, and chancery work
- International arbitration
- Personal injury and travel litigation
- Professional indemnity work
- Property (including landlord and tenant and construction)
- Public law (including civil liberties and human rights)
- Sports law
- Technology and construction disputes

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