

# COSTS NEWSLETTER

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## Farrar's Building News

### Clive Thomas, Editor



Welcome to Farrar's Building's inaugural costs newsletter which will be biannual. In this edition we look at some of the developments in the law of costs over the previous few months.

Firstly we start with an issue that is causing some difficulties for the lower courts namely the extent to which claimant solicitors can recover success fees and ATE premiums from a child's damages.

**Tim Found's** article on the recent case of *Jamadar v Bradford Teaching Hospitals NHS Trust* is a timely reminder, if one is needed, as to the dangers of failing to file a costs budget in time. We also look at the decision of Master Gordon – Saker in the case of *BNM v MGN* in which the Master, after assessing the receiving parties costs on the basis of reasonableness and necessity, proceeded to reduce them by a further 50% by applying the new proportionality test. Finally **Aidan O'Brien** provides a round up of some notable recent cost cases.

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## Infant Approvals: Success fees and ATE premiums

By **Clive Thomas**



### Introduction

There was a time in the not too distant past when the approval of a claim for personal injuries on the part of a child was a relatively straight forward application. The role of the court was largely restricted to ensuring that the terms of settlement were appropriate having regard to the child's injuries. Whilst historically a Litigation Friend was entitled to recover those costs that he/she had incurred on behalf of the child in pursuing the claim few such claims were advanced. Traditionally claimant solicitors tended to accept by way of costs whatever they could recover from the defendant. However, things changed dramatically after the 1<sup>st</sup> April 2013 when success fees and after the event insurance premiums, (ATE's), were no longer recoverable from the defendant but were, subject to some limitations, recoverable from the claimant.

These changes implemented through Part 2 of the Legal Aid Sentencing and Punishment of Offenders Act 2012, (LASPO) were brought into effect by the Conditional Fee Agreements Order 2013. The new legislation did not include any requirement for claimant solicitors to undertake a risk assessment as to the prospects of success as the basis upon which to arrive at an appropriate success fee. As a consequence some solicitors adopted the practice of seeking 100% success fees even in those cases where the risks of the claim not succeeding were modest.

Prior to the 6<sup>th</sup> April 2015 any costs or expenses that the solicitor sought to be deducted from the child's damages had to be assessed by way of a detailed assessment. However, since that date as a consequence of CPR 46.4 (5) and CPR 21.12 (1A (b)) the success fee can be assessed summarily if the damages do not exceed £25,000. These amendments were supported by an amended Practice Direction to CPR 21. Paragraph 11 of that Practice Direction provides that the Litigation Friend must support his/her claim for expenses and costs by a witness statement. CPR Part 21.12, the Practice Direction to that part and CPR 46.4 (5) are set out below:

#### **Rule 21.12 - EXPENSES INCURRED BY A LITIGATION FRIEND**

(1) Subject to paragraph (1A), in proceedings to which rule 21.11 applies, a litigation friend who incurs costs or expenses on behalf of a child or protected party in any proceedings is entitled on application to recover the amount paid or payable out of any money recovered or paid into court to the extent that it-

- (a) has been reasonably incurred; and
- (b) is reasonable in amount.

(1A) Costs recoverable under this rule are limited to costs incurred by or on behalf of a child by way of success fee under a conditional fee agreement or sum payable under a damages-based agreement in a claim for damages for

personal injury where the damages agreed or ordered to be paid do not exceed £25,000.

(2) Expenses may include all or part of -

- (a) a premium in respect of a costs insurance policy (as defined by section 58C(5) of the Courts and Legal Services Act 1990); or
- (b) interest on a loan taken out to pay a premium in respect of a costs insurance policy or other recoverable disbursement.

(3) No application may be made under this rule for costs or expenses that

- (a) are of a type that may be recoverable on an assessment of costs payable by or out of money belonging to a child or protected party; but
- (b) are disallowed in whole or in part on such an assessment.

(Costs and expenses which are also “costs” as defined in rule 44.1(1) are subject to rule 46.4(2) and (3).)

(4) In deciding whether the costs or expenses were reasonably incurred and reasonable in amount, the court will have regard to all the circumstances of the case including the factors set out in rule 44.4 (3) and rule 46.9.

(5) When the court is considering the factors to be taken into account in assessing the reasonableness of the costs or expenses, it will have regard to the facts and circumstances as they reasonably appeared to the litigation

friend or to the child's or protected party's legal representative when the cost or expense was incurred.

(6) Subject to paragraph (7), where the claim is settled or compromised, or judgment is given, on terms that an amount not exceeding £5,000 is paid to the child or protected party, the total amount the litigation friend may recover under paragraph (1) must not exceed 25% of the sum so agreed or awarded, unless the court directs otherwise. Such total amount must not exceed 50% of the sum so agreed or awarded.

(7) The amount which the litigation friend may recover under paragraph (1) in respect of costs must not (in proceedings at first instance) exceed 25% of the amount of the sum agreed or awarded in respect of—

- (a) general damages for pain, suffering and loss of amenity; and
- (b) damages for pecuniary loss other than future pecuniary loss, net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions.

(8) Except in a case in which the costs payable to a child or protected party are fixed by these rules, no application may be made under this rule for a payment out of the money recovered by the child or protected party until the costs payable to the child or protected party have been assessed or agreed.

### **Costs or expenses incurred by a litigation friend**

21PD.11.1

A litigation friend may make a claim for costs or expenses under rule 21.12 (1)

- (1) where the court has ordered an assessment of costs under rule 46.4 (2) at the detailed assessment hearing;
- (1A) where the court has assessed the costs to be paid by the child by way of summary assessment under rule 46.4 (5) (b) at the conclusion of the hearing at which damages to be paid to the child are assessed or at the hearing to approve the compromise or settlement under Part 21 or at any time thereafter;
- (2) where the litigation friend's expenses are not of a type which would be recoverable as costs on an assessment of costs between the parties, to the Master or District Judge at the hearing to approve the settlement or compromise under Part 21 (the Master or District Judge may adjourn the matter to the costs judge); or
- (3) where an assessment of costs under rule 46.4 (2) is not required, and no approval under Part 21 is necessary, by a Part 23 application supported by a witness statement to a Costs Judge or District Judge as appropriate.

11.2 In all circumstances, the litigation friend must support a claim for payment out in relation to costs or expenses by filing a witness statement setting out—

- (1) the nature and amount of the costs or expense; and
- (2) the reason the costs or expense were incurred.

11.3 Where the application is for payment out of the damages in respect of costs pursuant to rule 21.12 (1A) the witness statement must also include (or be accompanied by)—

- (1) a copy of the conditional fee agreement or damages based agreement;
- (2) the risk assessment by reference to which the success fee was determined;
- (3) the reasons why the particular funding model was selected;
- (4) the advice given to the litigation friend in relation to funding arrangements;
- (5) details of any costs agreed, recovered or fixed costs recoverable by the child; and
- (6) confirmation of the amount of the sum agreed or awarded in respect of—

- (a) general damages for pain, suffering and loss of amenity; and
- (b) damages for pecuniary loss other than future pecuniary loss, net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions.

#### **Rule 46.4 - Costs where money is payable by or to a child or protected party**

(5) Where the costs payable comprise only the success fee claimed by the child's or protected party's legal representative under a conditional fee agreement or the balance of any payment under a damages based agreement, the court may direct that—

- (a) the assessment procedure referred to in rule 46.10 and paragraph 6 of Practice Direction 46 shall not apply; and
- (b) such costs be assessed summarily.

Determining the level of the success fee and the ATE premium that should be deducted from the child's damages.

When it comes to determining the level of the success fee and the amount of the ATE premium that should be deducted from the child's damages the court will have to consider whether they have been "*reasonably incurred*" and "*reasonable in amount*", (CPR 21.12). However, CPR 21.12 (7) provides that the amount deducted for the success fee and the ATE premium shall not exceed 25% of the agreed damages for PSLA and past pecuniary loss net of any CRU deductions. This has led to a situation where the courts are now routinely presented with applications for deductions for costs of 25% of the child's damages. There is an absence of any judicial guidance as to how the court should approach such applications save for two very comprehensive judgments by the Regional Costs Judge in Birmingham DJ Lumb

in *A & M (By their Father and Litigation Friend MS) v Royal Mail Group*, August/September 2015. The learned judge offered this guidance:-

- a. If there is non – compliance with the practice direction the court cannot summarily assess the success fee. As a consequence the claimant’s solicitors will not be able to recover any sum by way of a success fee at the infant approval hearing from the child’s damages. In those circumstances the claimant’s solicitors can make an application for the success fee to be subject to detailed assessment, (as indeed happened in *A&M* resulting in the second judgment). The claimant’s solicitors should thus ensure that the Litigation Friend’s witness statement covers all of the matters set out in the practice direction. It is unlikely that a court will be lenient in the event of non – compliance with the practice direction. Indeed in *A&M* DJ Lumb refused to summarily assess the success fee and the ATE premium because of the following failures to adhere to the requirements of the practice direction:-
  - o A copy of the risk assessment was not provided. DJ Lumb recognised that a risk assessment was not required by the Conditional Fee Agreements Order 2013 however it was required by the practice direction.
  - o There was a failure to deal adequately or at all with the advice given to the Litigation Friend about funding arrangements or why a CFA was entered into.
  - o There was a failure to give details of any agreed costs.
    - DJ Lumb having refused to carry out a summary assessment of the success fee for non - compliance with the practice direction acceded to the claimant’s solicitors request for detailed assessment of the success fee element. The learned judge did not think it proportionate to order

*“a full blown detailed assessment under CPR 47”, (paragraph 5) and thus gave directions for an assessment on paper as to “what amount if any, should be deducted from the children’s damages under CPR 21.12 as a reasonable expense reasonably incurred by the Litigation Friend for the success fee of the Claimant’s solicitors costs”.*

- b. The recoverability of the ATE premium will be dependent upon whether it was *“reasonably incurred and reasonable in amount”*, CPR 21.12 (1). Utilising that test DJ lumb refused to make any deduction from the children’s damages. The learned judge held that in circumstances of infant passengers occupying a vehicle that is involved in an accident with the defendant who has admitted liability there are *“effectively no risks to insure against”*, (paragraph 27).
  
- c. There was a failure to assess the base costs. The Litigation Friend had not been provided with a bill of costs. The success fee was 100% of the base costs if the court did not know what the base costs were it could not determine if the success fee of 100% was *“reasonably incurred and reasonably in amount”*. The court rejected the argument that the success fee is capped at 25% of the general and past special damages claim so that the success fee is automatically crystallised as soon as the court approves the proposed settlement. This was considered incorrect as the court cannot approve the settlement until it has reached the stage at which it is satisfied that the

proposed deductions are reasonable.

- d. The appropriate deduction was 10%. The court was mindful of *Simmons v Castle 2012 [EWCA] Civ 1039* in which the Court of Appeal essentially implemented the recommendation of Sir Rupert Jackson that general damages for PSLA should be increased by 10% for CFA's entered into after 1<sup>st</sup> April 2013 to compensate a claimant for the additional irrecoverable expense of a success fee.

I have set out below a checklist which may assist those who find themselves making or deciding upon such applications.

**Checklist: Success Fees and ATE premium's payable from a child's damages.**

- 1. Does the court have the power to order that the success fee and ATE premium is to be payable from the Child's damages?**
  - Yes: CPR 21.12.
  
- 2. How does the court assess those costs?**
  - CPR 46.4: There must be a detailed assessment of the costs payable out of the child's damages, however
  
  - CPR 46.4 (5): where the costs only comprise a success fee under a CFA the court can assess those costs summarily.

- This only applies if the damages agreed or ordered to be paid do not exceed £25,000, (CPR 21.12 (1A)).
- If there is to be a summary assessment of those costs the Litigation Friend must comply with paragraph 11 of the Practice Direction to Part 21. He/she must provide a witness statement setting out/appendix to it:-
  - The nature and amount of the costs or expenses.
  - The reason the costs or expenses were incurred.
  - A copy of the CFA must be attached to the witness statement.
  - The risk assessment by reference to which the success fee was determined must be attached to the witness statement.
  - The reason why a CFA was chosen to fund the claim.
  - The advice given to the Litigation Friend in relation to funding arrangements.
  - Details of any costs agreed, recovered or fixed costs recoverable by the child.
  - Confirmation of the amount agreed or awarded in respect of general damages for PSLA, and special damages other than future pecuniary loss net of any sums recoverable by the CRU.
- If there is non-compliance with the PD it is arguable that the matter cannot be determined by the court by way of summary assessment and must proceed by way of detailed assessment, (DJ Lumb in *A v Royal Mail Group*). In that case the DJ held that a full detailed assessment was not proportionate and gave special directions for an assessment on the

papers).

**3. How does the court determine what level of costs are payable from the child's damages?**

- CPR 21.12 (1) the court will only allow those costs/expenses that:
  - a. Have been reasonably incurred: and
  - b. Are reasonable in amount.
  
- CPR 21.12 (4) in deciding if the success fee or ATE premium is reasonable in amount the court will have regard to all the circumstances of the case including the factors set out in CPR 44.4(3) and 46.9.
  - CPR 44.4 (3):
    - Conduct.
    - Value of the claim.
    - The importance of the matter to all the parties.
    - Complexity of the claim.
    - Skill, effort and specialist knowledge involved.
    - Time spent on the case.
  
- CPR 21.12 (7): Provides a cap as to the amount that can be paid out from the child's damages. The amount cannot exceed 25% of the damages awarded in respect of general damages for PSLA and past special damages net any sums recoverable by the CRU.

**4. Should the court award a figure for the success fee and ATE premium that represents 25% of the child's damages for PSLA and past special damages or a lower percentage?**

- The only judicial guidance is that of DJ Lumb in the case of *A v Royal Mail Group*, 18<sup>th</sup> September 2015. In that case the learned judge expressed this view.
  - As to the recoverability of the ATE premium: Irrecoverable in circumstances where there was an infant passenger in a vehicle driven by a defendant who had admitted liability.
  - As to the recoverability of the success fee: 10% in accordance with *Simmons v Castle*.

## Trip wire or just tripped up?



By **Tim Found**

July 2016 draws to a close with an extempore judgment from the Court of Appeal (Jackson & Lindblom LJJ) demonstrating that the apparently tough application of CPR 3.14 is not limited to one deterrent decision (*Mitchell*<sup>1</sup>). This most recent decision unsurprisingly affirms the three-part test in *Denton*<sup>2</sup>.

Of course, the outcome of the claimant's appeal in *Jamadar v Bradford Teaching Hospitals NHS Foundation Trust* (21<sup>st</sup> July 2016) is not a surprise. It seems to be a case which has striking similarities with the pertinent facts in *Mitchell*. The only small mystery is that the appeal was brought at all - the way the extempore judgment is summarised on the usual online legal reporting resources gives no obvious reason why the appeal ought to have succeeded.

Mr Jamadar's claim arose out of negligent clinical treatment which resulted in the amputation of one of his legs. Liability was initially denied so the court sent out the N149C form (Notice of proposed allocation to the Multi-Track). Shortly afterwards the defendant admitted liability. A judge revoked the N149C form and judgment was entered for an amount to be determined. The matter proceeded to a case management conference (it is presently unclear whether it was listed as a CMC or a

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<sup>1</sup> *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537

<sup>2</sup> *Denton v TH White Ltd* [2014] EWCA Civ 906

Costs and Case Management Conference). The defendant sent the claimant its costs budget and seems to have made more than one request for the claimant to provide his own in reciprocation.

At the CMC, the defendant's budget was approved and the judge ordered (following the claimant's failure to file his costs budget at least seven days prior to the CMC - CPR 3.13(2)) that the claimant's recoverable costs would be confined to court fees (pursuant to CPR 3.14).

The claimant unsuccessfully applied to vary the order or for relief from sanctions. A circuit judge refused the claimant's appeal.

At the Court of Appeal, the claimant argued that the effect of revocation of the N149C form was that the case stopped being in the multi-track. The CA found that the N149C form was revoked because liability was no longer disputed, but that the claim was plainly still a multi-track case because:

- The CMC had been listed for 2 hours;
- The value of the claim was approximately £3 million;
- Five fields of expertise had been permitted for each side (the parties had agreed the extensive list of experts); and
- A 5-day quantum trial was directed.

The CA found the district judge had been wrong to find that the case was factually so close to *Mitchell* that he was bound to follow it, but that the circuit judge had correctly followed *Denton*.

The breach was deemed serious and would have resulted in a further CMC which would be costly and demanding of court time. Both the district and circuit judges had rejected in strong terms the claimant's reason for breach (presumably referring to the contention that the case stopped being multi-track when the N149C form was revoked (!)) The circuit judge had properly set out the third part of the *Denton* test and taken CPR 3.9(1)(a) and (b) into account.

The Court of Appeal found that the circuit judge had reached a decision that was open to him. While other judges might have been more lenient, he had not left the ambit of his discretion.

Jackson LJ sat with Vos LJ in *Denton*. Their jointly-crafted decision at paragraph 37 recites a passage from the 18<sup>th</sup> Implementation Lecture on the Jackson Reforms which was also cited at paragraph 38 of the *Mitchell* decision:

*...the relationship between justice and procedure has changed. It has changed not by transforming rules and rule compliance into trip wires.*

The vast majority of our readers would sooner draft a costs budget with fingerprints than omit to file and exchange one at the appropriate time (rule 3.13 is reproduced below for ease of reference), but it's better to remind ourselves where the trip wires are, than to stumble over them ourselves.

CPR 3.13

(1) Unless the court otherwise orders, all parties except litigants in person must file and exchange budgets—

(a) where the stated value of the claim on the claim form is less than £50,000, with their directions questionnaires; or

(b) in any other case, not later than 21 days before the first case management conference.

(2) In the event that a party files and exchanges a budget under paragraph (1), all other parties, not being litigants in person, must file an agreed budget discussion report no later than 7 days before the first case management conference.

## Proportionality trumps reasonableness and necessity



By **Clive Thomas**

***BNM v MGN Limited [2016] EWHC B13 (Costs) 3<sup>rd</sup> June 2016***

Master Gordon – Saker.

Summary: The senior costs judge after determining that the claimant's reasonable and necessary costs were £167,389 proceeded to reduce them by 50% after applying the proportionality test as set out in CPR 44.3.

In July 2013 the claimant issued invasion of privacy proceedings against the defendant after the Sunday People discovered, via her lost mobile phone, that she was in a relationship with a Premier League footballer. The claim was funded by way of a Conditional Fee Agreement with an After the Event Insurance policy.

The claim was compromised in July 2014 via a consent order in which the defendant provided an undertaking not to use or disclose the confidential information. In addition the defendant agreed to pay damages of £20,000 plus the claimant's costs.

The claimant's claimed costs were £241,817 which included success fees of 60% and 75% for her solicitors and counsel respectively. In addition the ATE premium, (including tax) was £61,480. Following a "line by line" assessment as to what sums were reasonable and necessary the Master reduced the total costs to £167,389. At

that stage of the process the ATE premium remained intact. The defendant then argued that the sum arrived at was disproportionate and should be reduced further.

The test as to proportionality that has been in force since the 1<sup>st</sup> April 2013 is set out in CPR 44.3 (2) and (5).

*(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. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and*

*(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.*

*(Factors which the court may take into account are set out in rule 44.4.)*

*(5) Costs incurred are proportionate if they bear a reasonable relationship to –*

*a) the sums in issue in the proceedings;*

*b) the value of any non-monetary relief in issue in the proceedings;*

*c) the complexity of the litigation;*

*d) any additional work generated by the conduct of the paying party; and*

*e) any wider factors involved in the proceedings, such as reputation or public importance.*

The Master observed that it was clear “*that the new test of proportionality was intended to bring about a real change in the assessment of costs*”, (paragraph 20). The Master went on to state that the procedure that the court should follow in applying

this new test was that described by Sir Rupert Jackson in his final report in which he said as follows:-

*“In other words, I propose that in an assessment of costs on the standard basis, proportionality should prevail over reasonableness and the proportionality test should be applied on a global basis. The court should first make an assessment of reasonable costs, having regard to the individual items in the bill, the time reasonably spent on those items and the other factors listed in CPR rule 44.5(3). The court should then stand back and consider whether the total figure is proportionate. If the total figure is not proportionate, the court should make an appropriate reduction”, (Part 1, Chapter 3, paragraph 5.13).*

The Master then applied his mind to the five factors listed in CPR 44.3 (5). The Master noted that the claim had settled for £20,000. The Master also expressed the view that the sums in issue were always going to be modest. Whilst the Master acknowledged that the non – monetary relief claim was not easy to quantify he also stated that in his judgment it was not substantial.

The claimant had known in March 2011 that the defendant had access to the information on her phone and the phone was returned in May 2011. It was not until March 2013 that the claimant’s Father had sought legal advice. During the intervening two years there had been no publication of any information taken from the claimant’s phone. The Master did not consider the claim to have been particularly complex and felt that little additional work had been generated by the conduct of the defendant. Finally the Master did not think that there were any wider factors involved in these proceedings. There was no real threat of publication and

the claimant was not seeking in any real way to protect her reputation. The Master then made these general observations:-

*“This claim settled at a relatively early stage, a year after the issue of proceedings and 16 months after solicitors were first instructed, before the first case management hearing, before disclosure of documents or exchange of witness statements, before any hearing other than the application for an anonymity order. The scope of the evidence would be very limited and the case was neither factually nor legally complex”, (paragraph 48).*

Having considered these matters the Master reduced the solicitors and counsel's base costs by 50% having determined that they were *“disproportionate under the new test, being over 3 times the amount of agreed damages”, (paragraph 49).* Rather surprisingly the Master having considered that the ATE premium was reasonably incurred and necessary determined that it was disproportionate and reduced it by 50%. The Master had concluded that the claimant's prospects of success were *“significantly in excess of 50/50”, (paragraph 53),* and noted that the defendant had made significant admissions in its Defence.

#### Practice points.

1. When costs are assessed on the standard basis the court may not only reduce costs on the basis of what is reasonable and necessary but it will at the conclusion of that exercise consider a further reduction if those costs appear disproportionate.

2. Proportionality will apply not only to base profit costs but also additional liabilities and any ATE insurance taken out by the claimant. In the instant case the premium was limited to the amount that was allowable on assessment. The danger for claimant's is that if a premium is paid in advance there is a risk that on detailed assessment the premium may be reduced even if it is deemed to have been reasonable and necessary if the court takes the view that it was disproportionate.
  
3. Those advancing/resisting a proportionality argument must be mindful of those matters set out in CPR 44.3 (5). Costs will be deemed proportionate if they bear a reasonable relationship to the sums in issue, the value of any non – monetary relief, the complexity of the litigation, any additional work generated by the conduct of the paying party and any wider factors involved in the proceedings such as reputation or public importance.

## Case Law Round-up



By **Aidan O'Brien**

### ***Broadhurst v Tan* [2016] EWCA Civ 94**

Significance: In fixed costs PI claims falling under CPR Pt 45 s.IIIA, costs were payable on the indemnity basis where a claimant beat his own Part 36 offer.

**Facts:** The first appellant and second respondent succeeded in low value PI claims that fell under the fixed costs regime. They had both made Part 36 offers and each ultimately obtained more advantageous judgments. In both cases, the judge held that CPR r.36.14(3) applied. Despite this, in the first appellant's case, the judge indicated that there was no difference between profit costs assessed on the indemnity basis and the prescribed fixed costs. In the second respondent's case, the judge agreed that r.36.14(3) applied, but held that indemnity costs should not be equated with fixed costs.

**Held:** If r.45.29B was considered alone, the only costs allowable in a s.IIIA case would be the fixed costs in r.45.29C and disbursements. Notwithstanding this, r.36.14A was headed "costs consequences following judgment where section IIIA of Part 45 applies". The effect of r.36.14 and r.36.14A when read together was that where a claimant made a successful Part 36 offer, he was entitled to costs assessed on the indemnity basis. The tension between r.45.29B and r.36.14A had to be resolved in favour of r.36.14A. Where a claimant made a successful Part 36 offer in a

s.IIIA case, he would be awarded fixed costs to the last staging point provided by r.45.29C and Table 6B. He would then be awarded costs to be assessed on the indemnity basis from the date when the offer became effective.

***R (on the application of BSB) (Claimant) v Disciplinary Tribunal of the Council of the Inns of Court (Defendant) & Natasha Sivanandan (Interested Party) [2016] EWCA Civ 478***

Significance: CPR r. 48.6 was not applicable to proceedings before the Inns of Court, Disciplinary Tribunal of the Council. A Barrister who successfully defended herself was not limited to the Litigant in Person rate but was entitled to her costs incurred in the expenditure of her own professional skill, to be assessed in accordance with the independent discretion conferred by the Bar's Disciplinary Tribunal Regulations 2009 reg.31.

Facts: A Barrister appealed against a decision that the respondent Bar Standards Board should pay her costs (at a rate of £60 per hour) of successfully defending disciplinary proceedings brought against her. She was not in practice but had successfully represented herself in the disciplinary proceedings. The Disciplinary Tribunal of the Council appointed an assessor to determine the costs which the board should pay to her. The assessor considered that although the CPR did not apply, they were persuasive as to how he should exercise his discretion. He considered that he was bound by the decision in *Miller v Bar Standards Board* that a barrister acting in person was entitled to be remunerated for such legal work as if

she were acting in a professional legal capacity for another and was entitled to costs representing the expenditure of his own time and skill under CPR r.48.6 (4)(a). He therefore awarded the barrister her costs at £120 per hour. The Divisional Court quashed that decision, deeming £60 per hour to be reasonable.

Held: CPR r.48.6 did not apply to bar disciplinary proceedings. The assessor had therefore been wrong to find that he was bound by the decision in *Miller* and had erred in failing to exercise the independent discretion conferred upon him by Regulations 2009 reg.31. The court had been entirely correct to conclude that the barrister was entitled to claim the costs represented by the expenditure of her professional skill on the basis of common law.

***Courtney Webb (by her litigation friend Stacey Keira Perkins) v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365**

Significance: Whilst CPR Pt 36 did not prevent a court from making an issue-based or proportionate costs order, a claimant who had made a Part 36 offer less advantageous than the eventual judgment was to be deprived of all or part of his or her costs only if the court considered that it would be unjust to award those costs.

Facts: W appealed against a decision to make an issue-based costs order following her successful claim against the respondent NHS trust, notwithstanding the fact that she had beaten her Part 36 offer. W was a minor who had suffered injuries at birth. She alleged that the defendant NHS trust was negligent in (1) failing to

perform a caesarean section and, (2) managing the vaginal delivery inappropriately. The judge upheld the (1) but rejected (2). Having established that her injury had been caused by the trust's negligence, W was entitled to full recovery of damages. W had earlier made a Part 36 offer such that she would receive 65% of the damages claimed. The judge held that, as W had not succeeded on (2), an issue-based costs order was appropriate, and reduced the costs awarded to W accordingly.

Held: The judge could not properly have deprived W of her costs relating to (2) incurred before the effective date. The two allegations had been part of one event, namely W's birth. It had not been suggested that it had been unreasonable for her to pursue the second allegation. Rule 36.14(3)(b) entitled a successful claimant to all his or her costs on an indemnity basis, unless it would be unjust to award all those costs. Part 36 was a self-contained code. Part 36 did not preclude the making of an issue-based or proportionate costs order, but a successful claimant was to be deprived of all or part of his or her costs only if the court considered that it would be unjust to award all or that part of the costs. That decision fell to be made having regard to all the circumstances of the case. In exercising its discretion, the court had to take into account that the unsuccessful defendant could have avoided the costs of the trial had it accepted the claimant's offer. Appeal allowed.

### **Patience v Tanner & Anor [2016] EWCA Civ 158**

Significance: Decision considering the appropriate approach to be taken by appellate courts to appeals against costs orders made in actions which settled prior to trial.

Facts: The underlying case concerned the sale of land by the appellant to the respondents subject to a right of way in his favour. The right of way was never granted and the proceedings were for specific performance. In May 2014 the respondents offered a right of way, stipulating that the appellant must sign and return the deed by 29 May. The offer said nothing about the costs consequences of accepting. When asked about the costs situation, the respondents said they would respond, but did not. The offer was not accepted and the respondents withdrew it on 29 May. On 3 November, one week before trial, the respondents made an offer in identical terms to the May offer, which the appellant accepted. There was then a trial to determine costs. The judge accepted that it had been reasonable for the appellant to bring the proceedings and unreasonable for the respondents to defend them albeit the May offer should have ended the proceedings and that as the appellant had accepted identical terms in November, he should pay the respondents' costs from 29 May (£80,000).

Held: The law applicable to costs decisions in actions resolved prior to trial was expressed in *F&C Alternative Investments (Holdings) Ltd v Barthelemy (Costs)* [2012] EWCA Civ 843 and *BCT Software Solutions Ltd v C Brewer & Sons Ltd* [2003] EWCA Civ 939. The court proceeded on the basis that the test of "manifest injustice" was additionally applicable when a case had been settled before trial, and that the parties had reached a "settlement" which fell within the scope of that case. The judge had been justified in refusing the appellant his costs after 29 May 2014. Both parties' conduct had substantially contributed to the case coming to court in

November when it should long since have settled. The judge had correctly focused on the appellant's failings; however, he had lost sight of the respondents' failings after 29 May. That was a material omission, which amounted to a "manifest injustice" because it had led to an outcome for the appellant which was not properly sustainable. It followed that the court was justified in intervening in the costs award. The appropriate order was no order for costs after 29 May so that each party would bear its own costs after that date. Appeal allowed.

***Littlestone & Ors v Macleish* [2016] EWCA Civ 127**

**Significance:** A defendant who made a payment pursuant to an admission could not rely upon the same as increasing the value of their Part 36 offer. In the absence of contrary agreement, an admitted payment on account of a claim, following a Part 36 offer in a higher amount, had to be taken as being made as much on account of the Part 36 offer as on account of the claim itself.

**Facts:** The original claim was for damages for breach of the tenants' repairing obligations. On 13 February 2013, the tenants made a Part 36 offer of £35,000. Shortly thereafter, they filed a defence in which they admitted liability in the sum of £17,504. On March 7, they wrote to the landlord proposing to pay him that sum "pursuant to the terms of the Defence" The landlord replied that the payment would be accepted on account of the claim only, the figure in the defence being disputed. Without further correspondence, the tenants made payment of £17,504 to the landlord. The case went to trial. Damages for breach of the tenants' repairing

obligations were assessed at £48,409. The judge ordered the tenants to pay the landlord's costs of the action, to be assessed on the standard basis. The tenants argued that the judge should have awarded them their costs from 13 March 2013, being 28 days after the making of their Part 36 offer, as the landlord had failed to beat that offer; in that respect, the value of the offer was £52,504 (£35,000 plus £17,504). The landlord argued that the judge should have made the award on the indemnity basis, so as to reflect his contractual entitlement under the relevant lease to an indemnity for costs incurred in the recovery of sums due from the tenants.

Held: The Part 36 offer was an offer to settle the entirety of the landlord's claim for £35,000. Nothing in the correspondence about, or the making of, the admissions payment made any reference to the Part 36 offer. The admissions payment was plainly made, and indeed accepted, on the basis that it was a payment on account following admissions, against the landlord's entire claim. The admissions payment was, for the same reason, liable to be taken into account as a part payment in advance of the £35,000 that would have been due and payable to the claimant if, thereafter, he accepted the Part 36 offer. The judge was correct to award damages in the sum that she had, treating the admissions payment as something to be taken into account, rather than as reducing the quantification of the damages payable.

The landlord obtained a judgment more advantageous than the value of the Part 36 offer, so that the judge was correct to award him his costs of the action. The critical flaw in the tenants' case was that it failed to address the obvious reality that an admitted payment on account of a claim, following a Part 36 offer in a higher amount, had, in the absence of any agreement to the contrary, to be taken as being

made as much on account of the Part 36 offer to settle the claim as on account of the claim itself. Part 36 offers and admissions payments had different purposes. The former encouraged settlement, while the latter narrowed the issues. The judge should have chosen an indemnity rather than the standard basis for assessment. It was well settled that when exercising discretion as to the basis of assessment of costs under the CPR, the court should normally do so in a way which corresponded with any contractual entitlement agreed between the parties. The tenants had covenanted to "*pay to the Lessor all costs and expenses (including legal costs ...) which may be incurred by the Lessor ... in or in contemplation of any proceedings under Sections 146 and 147 of the Law of Property Act 1925 ... or [in] the recovery or attempted recovery of arrears of rent or other sums due from the Lessee*". Although that phraseology did not refer expressly to an indemnity, it corresponded more closely with assessment on the indemnity basis than it did with assessment on the standard basis. Appeal dismissed, cross-appeal allowed

***Colin Crooks v Hendricks Lovell LTD [2016] EWCA Civ 8***

Significance: Decision considering the correct interpretation of a defendant's part 36 offer in a PI claim that was stated to be net of the recoverable benefits payable to the Compensation Recovery Unit.

Facts: A claimant appealed against a decision that he had failed to beat a defendant's part 36 offer. The defendant made a part 36 offer for "£18,500 net of CRU and inclusive of interim payments in the sum of £18,500". The defendant ticked

the box which stated that the offer was made "without regard to any liability for recoverable benefits". At the time of the offer, the amount of CRU was £16,262. At trial a few months later, the claimant obtained judgment for £29,550, comprising £4,000 general damages and the balance for lost earnings. A decision on costs was postponed pending the claimant's appeal against the CRU certificate. A revised CRU certificate showed deductible benefits of only £6,760. A dispute arose as to the amount of the defendant's part 36 offer. The defendant's case, with which the recorder agreed, was that its offer had comprised the interim payment of £18,500 plus the CRU sum outstanding at that time of £16,262, and that the claimant had failed to beat that offer at trial.

Held: The defendant's offer was valid under r.36.15(3)(a). There was no contradiction between the concept of the offer being made "net of CRU" and its being made "without regard to any liability for recoverable benefits" under r.36.15(3)(a).

The natural meaning of an amount stated to be "net of" something else was the amount that remained after a deduction of tax or other contributions. The gross compensation contemplated by the defendant when making the offer was not the crucial point. What mattered was the meaning of "net of CRU", which was how the offer had been expressed. The natural meaning of that phrase was "remaining after all necessary deductions of benefits. It followed that when an offer made in such terms was compared to damages awarded by the court to determine whether it was more advantageous, it was necessary to consider the amount of damages after any corresponding adjustments for recoverable benefits had been made.

The regime in r.36.14 applied to the circumstances as they were once judgment had been given, but not necessarily only at the moment of delivery. The phrase "upon judgment being entered" was not to be narrowly interpreted and meant "once judgment has been given and not before then".

When considering whether a defendant had beaten a part 36 offer, it was necessary to compare the offer with the judgment on the same basis, allowing for any necessary subtraction for recoverable benefit from the total figure for damages in the judgment award if that was the nature of the offer, as it was in the instant case, or including the figure for recoverable benefit if the offer was made in those terms. One had to look at the net sum paid to the claimant, not the gross sum including monies payable to CRU.

The real measure of whether the claimant had bettered the offer after issue of the revised CRU certificate was whether the total payment he actually received was more or less than the amount of the offer. The focus of r.36.14(1), (1A) and (2) was on the comparative advantage to the claimant as between offer and judgment, not disadvantage to the defendant. The judgment award of £29,550 was subject to a deductible CRU amount of £6,760, leaving £22,789 as the amount that was net of recoverable benefit. That was the figure that ought to have been compared to the figure of £18,500 net of CRU in the offer, because that was the value of the judgment "net of CRU". The basis on which the costs order was made was flawed. The costs order was set aside and the defendant was ordered to pay the claimant's costs of the proceedings. Appeal allowed.



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