NWL COSTS LAWYERS

Costs Conference

June 2022

Suite C2c, The Quadrant, Sealand Road, Chester, CH1 4QR
Tel: 01244 317543 Fax: 01244 312185
www.nwlcosts.com

lee.evans@nwlcosts.com

ACL Association of Costs Lawyers

NWL Costs Conference Programme

WEDNESDAY 8 JUNE 2022

13.30-14.00	Registration
14.00-14.05	Opening remarks
14.05-15.15	Professor Dominic Regan – Legal Update
15.15-15.30	Tea break
15.30-15.45	Professor Dominic Regan, Andrew Tollitt and Matthew Grew – Q&A Session
15.45-16.55	Professor Dominic Regan – Legal Update
16.55-17.00	Closing remarks
17.00-18.30	Drinks Reception

Professor Dominic Regan – Legal Update

1. The big 2021 development was the introduction of demanding new trial witness statement rules in the Business and Property Courts. The judgment in **BLUE MANCHESTER (2021) EWHC 3095 (TCC)** is illuminating. The appendix following paragraph 55 sets out each contested element with the decision of the Judge as to whether the passage was compliant. In **PRIME LONDON HOLDINGS LIMITED V THURLOE LODGE LIMITED (2022) EWHC 79** (Ch) a statement lacked the requisite confirmations from witness and solicitor and also included improper material. The Court ordered replacement of the statement with a compliant one and intimated that indemnity costs were likely to be awarded. Striking out was acknowledged to be "a very significant sanction which should be saved for the most serious cases". Fancourt J had harsh words to say about both the witness and the Solicitor who certified compliance in **GREENCASTLE V PAYNE (2022) EWHC 438 (IPEC).** "I have real doubt whether either of them has read the Practice Direction or, if they have, whether they understood the effect and purpose of it". Having concluded that this was "an egregious case of serious non-compliance with the PD" the Judge decided, with trial imminent, to withdraw permission for the witness to give evidence but to permit the claimant to prepare a replacement, fully compliant statement within 6 days. That was tidier than performing surgery upon the defective statement. It was for the defaulting party, rather than the court or defendant, to bear the burden and costs of perfecting their witness statement.

2. Judges generally are much more alert to the various witness statement Rules. Everyone needs to know the 1992 measures which apply to all civil litigation including non - trial material in the Business and Property Courts. Common breaches include failing to deliver evidence in the first person, introducing opinion and conjecture and quoting at length from documents. The most common cause of difficulty is **CPR 32.10**. Failure to serve in time means that statements cannot be deployed unless the **DENTON** criteria are satisfied.

3. CPR 1 was amended in April 2021 so as to oblige the Court and parties to accommodate vulnerable witnesses. Ground Rules should be considered at the outset says paragraph 8 of the accompanying Practice Direction. In **TVZ V MANCHESTER CITY FOOTBALL CLUB (2022) EWHC 7 (QB)** the Court had guaranteed that the sexuality abused claimants would each give evidence at a pre-determined date and time. That fixture was sacrosanct and alleviated general anxiety and uncertainty. Meanwhile, the Court of Appeal concluded that the decision of a judge was unjust on account of procedural irregularity in **A V A LOCAL AUTHORITY (2022) EWCA Civ 8**. One party had cognitive difficulties which had not been taken into account thus precluding her from having a fair opportunity to present her case. The PD was amended this April to give some examples of special measures that might be taken. These include taking evidence in private, using screens in court, posing questions via an intermediary and taking evidence remotely.

4. The Master of the Rolls approved an increase in guideline hourly rates which took effect last October. Master Rowley at paragraph 44 of **R v BARTS NHS TRUST (2022) EWHC B3** (Costs) said "Where the work is as recent as 2019, it seems to me there is no argument that the correct starting point is the 2021 guideline figures". He then proceeded to allow even more for all grades of fee earner on account of importance, urgency and complexity. The M.R. has indicated a further review in just 2 years time, Master Brown in **TRX V SOUTHAMPTON FC (2022) EWHC B7** applied new rates to work undertaken as far back as 2017.

5. London is divided up into 3 areas with a grade A fee earner attracting £512, £373 or £282 dependent upon zone. The rest of the Country falls within either National 1 for specified areas (Bury St Edmunds, Birmingham, Liverpool and Manchester for example) and everywhere else (Exeter) in National 2. The Guide to Rates acknowledges that higher rates may be warranted in "substantial and complex" litigation. Pointers would include value, urgency, importance and any international element. Any uplift is confined to Grade A, B and C only. What of distant, remote fee earners? Look to the location of the office to which they are (predominantly) attached!

6. A receiving party can expect to enjoy "a raft of enhancements" as it was so eloquently put by the Court of Appeal in **CALONNE CONSTRUCTION V DAWNUS (2019) Costs LR 309.** This decision was codified by CPR reform in April 2021. The offeror stipulated that interest on their Part 36 offer was to accrue from the end of the relevant period; "The Settlement Sum is inclusive of interest until the relevant period has expired. Thereafter, interest at a rate of 8% per annum will be added". The 2022 White Book at page 1286 recommends the use of such a clause so as to provide protection against late acceptance of an offer which could be very late indeed. In **TELEFONICA V OFFICE FOR COMMUNICATIONS (2020) EWCA Civ 1374** the claimant had bettered its offer by £4.5m or 9%, yet received no more interest than would have been payable had it made no offer at all! It would be highly unusual for the Court to grant some benefits but to withhold others. Indemnity costs and an additional £75,000 "was an almost trivial uplift and any significant enhancement in overall relief would only have been achieved by the award of additional interest on the principal sum" which was £54m (paragraph 42). The Judge was in error by regarding the award of 2 trivial enhancements as justification for not awarding the major enhancement, uplifted interest. The Appeal Court corrected the omission and so Telefonica gained a useful extra £900,000. Interest at up to a maximum of 10% above base is the most lucrative reward in high value litigation. Incidentally, the White Book commentary at paragraph 36.5.2 strongly recommends use of the Court Form to make offers.

7. In 2017 the Court of Appeal declared that Part 36 could be used to punish the unreasonable; see **PETROM V GLENCORE (2017) 2 Costs LR 287.HOCHTIEF V ATKINS (2019) EWHC 3028 (TCC)** saw a claimant who bettered their Part 36 quantum offer by £4,500 reap an uplift of £65,000 and interest at 6% above base plus indemnity costs.

8. Since 2015 the Court has been obliged to consider if an offer was a genuine attempt to settle. Courts were already alert to this issue. See **HUCK V ROBSON (2002) EWCA Civ 398** and **AB V CD EWHC 602 (Ch)**. In unusual circumstances the High Court in **RAWBANK V TRAVELEX (2020) EWHC 1619 (Ch)** held that an offer to take 99.7% was genuine. The claim was, unusually, unanswerable. The White Book identifies the total lack of an arguable defence and warns that the case "should not generally be seen as encouragement to claimants to make exceptionally high offers".

9. The measure continues to generate authorities. In **FKJ V RVT (2022) EWHC 411 (QBD**) Mrs Justice Collins Rice refused permission for a Part 36 offer to be referred to at an interim application for the purposes of case and costs management. I can recall Judges taking account of payments into court when being invited to order security for costs.

10. I had an illuminating chat with the Master of the Rolls in November. He made some intriguing noises about the alleged benefits of budgeting. Whilst some Judges have in private moaned about the efficacy of the process, in **SMITH V FORD (CONTRACTORS) LIMITED (2021) EWHC 1749 (QB)** Master Davison broke cover and tossed a grenade into the world of costs management. "…QB Masters, Chancery Masters and Costs Judges do not necessarily share this defendant's expressed confidence that costs

budgeting controls costs better, or more effectively, than detailed assessment. This is a large topic and a complex and somewhat sensitive issue. The present hearing is not, perhaps, the forum to debate it at any length". Sir Geoffrey also flagged up foreign litigants. The Judiciary must be astute to "money no object" litigation being pursued by Foreign oligarchs. Courts are there to dispense necessary Justice and are not to be used as an instrument of revenge or score settling. He is outraged at the size of the White Book and wants a massive reduction in the mass of Rules. He still uses a 1999 edition, the last to be based upon the Rules of the Supreme Court.

11. The claimant pocketed a useful £1 million of costs in **NATIONAL BANK OF KAZAKHSTAN V BANK OF NEW YORK MELLON (2021) EWHC B7 (Costs**). Having secured a costs order the claimant served a bill with notice of commencement stipulating that points of dispute had to be served by 5th January. None appeared and on the 6th the claimant applied for and obtained a default costs certificate. An apoplectic defendant demanded that it be set aside. Since the certificate was regular the only question for Master Rowley was to decide if there was "good reason" for a detailed assessment to take place pursuant to CPR 47.12(2). He followed the threefold structure of the **DENTON** test to determine the point. The failure to honour a time limit was serious, "oversight" was not a good excuse and the assertion that the paying party expected to reduce the bill by $1.2m did not impress. If every DCC could be overturned by an assertion that assessment would likely cut costs, then the certificate would be rendered futile and would always be set aside. Master Leonard took an identical approach in **MASTEN V LONDON BRITANNIA HOTEL (2020) EWHC B31.**

12. It is certain that the Judiciary will be granted powers to order litigants to engage in Alternative Dispute Resolution or Negotiated Dispute Resolution as the Commercial Court Guide 2022 now calls it. The Civil Justice Council Review has agreed that it is lawful to compel participation in an ADR process and that it would be desirable to do so in a variety of disputes. A working party is now considering the way forward. Their agenda includes identifying appropriate cases, sanctions for default, the protection of vulnerable parties and whether a court accredited list of approved mediators should be established. It is already dangerous to even ignore, let alone reject, a suggestion that one should address ADR. See **PGF V OMFS (2013) EWCA Civ 1288 and BXB V WATCH TOWER (2020) EWHC 656(QB)**. Sir Rupert Jackson considered PGF a "groundbreaking decision". It is of the greatest importance for all litigators and provided a form of free costs insurance for the claimant (there is no reason why it could not equally be employed by a defendant). C had written suggesting that the parties engage in ADR. D ignored the suggestion and a chasing letter too. On the cusp of trial, things took a horrible turn with a significant element of the claim collapsing. C had no alternative but to accept an early Part 36 offer made by D. The strong default position is that C would be required to pay the costs of D from the end of the relevant period **CPR 36.13 (5) (b)** unless it would be unjust to do so. Briggs LJ deprecated the failure of D to acknowledge the suggestion of ADR and this enabled the claimant to walk away from a costs liability of perhaps £200,000. Tim Wallis who has written the White Book notes on ADR (which are shamefully hidden at the back of volume 2) kindly gave me that detail. <u>One must always acknowledge any mention of ADR in a constructive manner.</u>

13. Fixed Costs are coming for many matters worth between £25,000 - £100,000. There will be 4 bands of work, with the most complex being in band 4. "The Government can confirm that mesothelioma/asbestos, complex PI and professional negligence, actions against the police, child sexual abuse, and intellectual property will be excluded from intermediate cases, as Sir Rupert originally proposed". Note that whilst implementation will be next April, the changes will only apply to cases where the cause of action accrued on or after that date so the immediate impact will be modest. It will see off budgeting at the beginning and detailed assessment at the end. The indemnity principle will be

disapplied and a good Part 36 offer will generate a 35% uplift in costs. There will definitely be fixed costs for most clinical negligence cases worth up to £25,000 and it has been decided that they will apply where the claim is notified on or after implementation day (**not** the date when the cause of action accrued).

14. There is a thriving cottage industry in challenging bills presented by a Solicitor to their client. **CPR 46.9(3)** states that costs are to be presumed to have been reasonably incurred with the approval, express or implied, of the client. Again, the amount is presumed reasonable if similarly approved by the client **(CPR46.9(3) (a and b)**. However, costs will be presumed to have been unreasonably incurred if they are of an unusual nature or amount and the solicitor did not tell the client that as a result the costs might not be recovered from the other party - **CPR 46(3)(c)**. In **HERBERT V HH LAW (2019) EWCA Civ 527** the Court of Appeal identified a fundamental distinction between mere consent and informed consent. **BELSNER V CAM** was adjourned on February 23rd when it dawned upon the same court that more profound issues needed to be addressed. The Court of Appeal aborted the hearing on February 23rd and it is now relisted to start on July 11th or 12th. One question for the reconvened **BELSNER** hearing, and one of real importance, is whether there were proceedings extant? What constitutes proceedings? This action was settled without the formal commencement of litigation. Conventional wisdom would suggest that there were no proceedings. Consider **McGLINN V WALTHAM CONTRACTORS LIMITED (2005) EWHC 1419 (TCC)** where Judge Peter Coulson QC as was refused to order a claimant to pay costs of £20,000 after he had abandoned claims made through the Pre-Action Protocol for Construction Disputes. Save for exceptional circumstances and unreasonable conduct, the abandonment of those claims formed no part of the proceedings that were later issued and so were not costs incidental to any subsequent proceedings. The Court of Appeal held in **BETHELL V DELOITTES (2011) EWCA Civ 1321** that there proceedings came about <u>when a claim form was issued</u> and this empowered the Court to award costs to D despite the fact that the claim form was not served in time and so the action was statute barred.

15. We have seen the Judiciary clearing the decks where a claimant was found to have 'warehoused' a claim. **ALFOZAN V QUASTEL MIDGEN LLP (2022) EWHC 66 (Comm)** was issued on 21st December 2018. The Saudi resident claimant alleged negligence in respect of various property investment transactions. D2 on 21st May 2021 successfully argued that C had no intention of pursuing the action. 21 breaches of the pre-action protocol, Rules and Practice Directions were identified. It was contrary to the overriding objective to allow a claim to fester and so it was struck out.

16. The Disclosure Pilot now runs until the end of this year. Hollander in the excellent new edition of 'Documentary Evidence' wryly observes in his introduction that the scheme "would be unlikely to win a popularity contest and is regarded as making a significant contribution to the increase in costs of civil proceedings", the very opposite of what it was supposed to do. Given that it had the backing of Sir Geoffrey Vos when he was Vice Chancellor it may yet survive but I do not detect any appetite for its extension to other Courts. It was applied by Meade J in **SHEERAN V CHOKI (2021) EWHC 3553 (Ch**) where it was asserted that C had failed to adequately comply with an order for extended disclosure. Under paragraph 17 of the PD the Court may make further orders which include requiring a party to make a witness statement explaining any matter or take further steps. For this to engage "Speculation is not enough. Something is needed to show that there is a likelihood (as opposed to a possibility) of further relevant documents existing". The Judge found that he was justified in ordering further searches. Disclosure for the claimant was dealt with by his business manager. "In my view that is unsatisfactory and I order, of my own motion, that Mr Sheeran is to make a witness statement…stating that he has personally satisfied himself that his disclosure obligations

have been met". Despite being busy, it is important that people take responsibility for their own disclosure. The February 2022 Commercial Court Guide at Part E1(4) that junior advocates are eminently capable of dealing with disclosure directions and indeed case management conferences too.

17. The Master of the Rolls said in March that legislation is in the pipeline which will create broad Pre-action Protocols and a general litigation Portal. Embedded in that process will be regular ADR prompts. All litigation is to go electronic with no exemption for litigants in person.

Q&A Session

MOST ASKED QUESTIONS – or known colloquially as Tim's Friday Quiz!
- With Professor Dominic Regan, Andrew Tollitt and Matthew Grew -

Q1. What rate would you give for this Bill?

Q2. What rate should we put in this budget?

Q3. Can we vary the budget?

Q4. What is the purpose of an open settlement offer put forward at the time of service of the Points of Dispute to comply with CPR 47.9 Cost Practice Direction 8.3?

Q5. Should a Claimant investigate and proceed to apply for Court fee remission if available?

Q6. Should a Court issue fee be recalculated to reflect the level of damages recovered?

Firstly, **Q3. - Can we vary the budget?**

Yes, you can and you should try to if a change warrants it.

I have overspent can I recover those costs?

Yes, maybe, if there is still more overspending to come.

Be pro-active – if going to overspend, tell us, we can help, we can tell the Defendant, we either agree the extra allowance, we let the Court decide or we agree to claim the overspend in the bill, subject to a "good reason" to depart argument.

Varying is entirely possible, same too recovering some overspends, but both made very difficult if you don't tell your opponent you need to vary.

Assumptions are important.

Both as set out in the budget but as referred to on the CCMC hearing.

The paper trail should be clear, NWL Budget, then the BDR and Advocate's CCMC Report.

Sometimes the best way is to get ahead of the argument. So, claim figures based on certain assumptions, then remove those assumptions, which means you then concede certain sums. If the event subsequently happens you seek to vary and get the monies back in. With fairly detailed assumptions and notes as to how the budget was agreed or approved this is a good way to vary.

Case law helps – see **Al-Najar & Ors v The Cumberland Hotel (London) Ltd [2018] EWHC 3532 (QB) (16 October 2018)** – it is not a "high bar".

The logic being if you set it too high you get "over-generous" assumptions and costs included.

There does need to be a change in circumstance leading to a significant change in costs.

See also – ***Persimmon Homes Ltd and Anor v Osborne Clarke LLP and Anor*** **[2021] EWHC 831 (Ch)**. It is important you act promptly. There also needs to be significant development.

It can't be an attempt to address a miscalculation or an overspend or to claw back previously disallowed costs.

Back to **Q1. and Q2. - What rate would you give for this Bill? and What rate should we put in this budget?**

It is all subjective. There is no set rate for any particular type of case.

Even more subjective is the rate set at the end for the bill but in the middle(ish) of the case for the budget, or at least the budget is set with a rate in mind.

The case can attract more than one rate for the same fee earner.

Rolling the answer to Q1 and Q2 together, to highlight the difficulties, can I recover £350 and then £425 for a case?

Answer – yes.

Your retainer says £425. The conduct period 2016 to 2021.

Budget is prepared on the basis of £425. The Claim Settles and the costs are within budget. There is no opposition to budgeted costs. However, the Defendant opposes earlier £350 an hour increasing to £375, then £400 all pre-budget. It was a £1m plus settlement, weeks before trial. Most likely £350 pre-budget, but you recover £425 after budget – it was not opposed as you were within budget.

This highlights two different processes. One is the estimate giving you an allowance going forward. A higher rate in the budget seems to make it easier to claim a higher rate in the bill than would otherwise have been allowed if being assessed. The other is an assessment looking back when the Judge sets the rate for work you have done. But you don't know what rate until it is over.

May sound a little illogical, even frustrating, but that is how estimates and assessments play out.

We have had a recent decision from one of the RCJs in Manchester, whose local court is now Barnet, CP case Quantum only, £13m claim, settled for £3.7m plus payments. The rate was claimed from £350 to £400. The Judge allowed £350 for 2016, then from 2018 £370.

Guidance from the Judge – he said he looks at;

1. The degree of complexity

2. The year

3. Skill needed or reflected

On this case he also said he would have given a slightly higher rate if liability was still an issue.

Compare to a recent PA from Manchester -

£41,000 settlement, finger injury, clinical negligence claim. Total costs £43,000. Rate of £300 for A and £200 for Grade C Nurse. Rates as claimed on Provisional Assessment.

In summary,

1. Budget rate – as high as reasonable, also bear in mind it works as a solicitor/client estimate too.

2. Bill rate – depends on how the case turned out, complexity, value, you may have one rate pre-budget, one rate post budget.

3. Vary a budget – possible but act promptly when you notice a change is needed.

Q4. - What is the purpose of an open settlement offer put forward at the time of service of the Points of Dispute to comply with CPR 47.9 Cost Practice Direction 8.3?

In short – it appears very little or none!

The Practice Direction states:

"The paying party must state in an open letter accompanying the Points of Dispute, what sum, if any, that party offers to pay in settlement of the total costs claimed. The paying party may also make an offer under Part 36".

This is why a paying party will put forward an open offer at the time of service of Points of Dispute, however such offers are routinely significantly less than previous without prejudice settlement proposals and/or those are stated to be "nil".

Where a paying party puts forward an open offer lower than its previous without prejudice proposals – or indeed nil, this often causes understandable confusion as to why they are doing this.

The simple answer is that the offer is being made to comply with the rule, and the inclusion of the "if any" provision therein enables a Defendant to make a "nil" offer and still comply. Even if the "if any" provision were removed it is likely offers of £0.01p would be made.

It is assumed that a paying party would not wish to make an open offer at the level of its previous without prejudice proposals to potentially avoid a receiving party using the offer to support an application for a payment on account of costs. An open offer can be referred to, however, we have found no evidence or indication on the part of the Court that they will place greater weight on an open offer of nil than a previous without prejudice offer, or that the open offer supersedes the previous proposals.

The rule was introduced in April 2013 and it is difficult to understand the exact thinking behind it, particularly given the Courts have shown no desire to strike out Points of Dispute in the event that an open offer is not made. Indeed, this was a point recently taken within Points of Dispute which proceeded to Assessment and the point was dismissed by the Regional Cost Judge at the commencement of the Assessment.

It is also worth noting that whereas there is provision within the CPR for the open offer to be included with a Request for Provisional Assessment, i.e. where Bills total less than £75,000, it is not a provision when requesting a Detailed Assessment.

The rule was brought in at the same time as the Provisional Assessment procedure and presumably was designed to co-exist with same, however in real terms, open settlement offers do no more than simply confuse receiving parties.

Q5. - Should a Claimant investigate and proceed to apply for Court fee remission if available?

Where Court fees, in particular the Court issue fee, are claimed within a Bill of Costs, a Defendant will routinely query whether Court fee remission was available and contend that if an application for fee remission was not forthcoming and/ or fee remission would have been available had an application been made, then the Court fees should be disallowed.

Where a Claimant has sought to recover the Court issue fee and not proceeded with an application for Court fee remission, despite said remission potentially being available, the fee has been maintained on the basis of a number of arguments.

These include that as a matter of legal principle a Claimant is entitled to require a Defendant wrongdoer to pay for the damages caused by their wrong doing and to refuse other forms of support or provision which would have the practical effect of reducing the Defendant's liabilities. In the context of mitigating damages, the case law is against the argument that a Claimant is obliged to claim state support to mitigate a wrongdoer's liability as the Claimant had a right to claim damages from the wrongdoer without any requirements to mitigate her loss by reliance on the public purse.

This was confirmed in ***Peters v East Midlands Strategic Health Authority (2010) QB 48***, where the Court of Appeal found that such an argument was misconceived, as the Claimant had a right to claim damages from a Tortfeasor without any requirement to mitigate their loss by reliance upon the public purse. It is the Claimant's position that with regards to damages the same should apply to costs and that a Claimant declining to rely upon a statutory right to fee remission and actually paying the Court fee, should be able to recover them as a right from the Tortfeasor.

There have been various decisions on the issue of fee remission however the 2 most recent have been conflicting.

In the matter of ***Ivanov -v- Lubbe*** – HHJ Lethen sitting as a Circuit Judge on Appeal, Central London County Court January 2020 – found for the Claimant that an application for fee remission was not required:

"*The Court argument is whether it is reasonable to expect a Claimant to use the scheme or alternatively whether this places a burden on the tax payer that is unreasonable. In this respect I agree with (Claimant's Counsel) that there is a loss where fee remission is utilised. The public purse is depleted by the amount that would otherwise have been paid. On this basis there is less in the public purse to devout to the justice system as a whole. Plus, any suggestion that there is not a loss where fee remission is utilised is misconceived. I am satisfied that (Claimant's Counsel) is right to characterise the dispute as to who bears the loss, the public purse or the Tortfeasor. There is a formidable body of case law that allows the Claimant to legitimately elect to make their claim against the Tortfeasor as opposed to relying on alternatively sources of funding"*.

This decision was however rejected by Cost Judge Master Rowley in ***Gibbs v King's College NHS Foundation Trust (2021) EWHC B 24 (Costs)***, who reached the opposite conclusion and disallowed the Court issue fee.

Master Rowley approached the issue from a different angle and found:

"*In **Ivanov**, the Claimant put the argument in respect of mitigation of loss as being a question as to whether the loss should be borne by the wrongdoer or the State….. The Claimant's Counsel in **Ivanov** is said to have described the idea that there was in fact no cost if the feeling applied as being "misconceived" because there was still a cost to the State where parties litigate. HHJ Lethen agreed with the Claimant's Counsel that there was a loss where fee remission is utilised because "the public purse is depleted by the amount that would otherwise have been paid*".

As far as I can see, there was no evidence put forward by the Claimant's Counsel as to this loss to the State and it was submitted as essentially a matter of common sense. In other words, where Court proceedings are commenced, the Court would expect to receive a fee in accordance with the Civil Procedure Fees Order 2008 (as amended). If it does not receive the fee, then there is reduced income to the Court's service and that affects the administration of justice overall.

I regret to say that I do not think that that is necessarily correct. It seems to me to be equally plausible that, by bringing in a fee remission scheme, Parliament would expect all those to qualify for that remission to use it. After all, the fees often represent a significant sum: here it is £10,000.00. As such, any calculation made often a number of people being exempt from using Court fees by Parliament would be considered prior to bringing in the scheme and where appropriate, when it was adjusted thereafter. To the extent that a person entitled to use the scheme did not do so, then that would be unexpected lessening of the costs in Parliament's calculations.

It does not seem to me to be appropriate to conclude that a Claimant who uses the fee remission scheme, even though they might have been entitled to oblige the wrongdoer to pay the fee, has caused the State to lose money it was expecting to receive. It is just as likely that such Claimants are precisely following a model designed by the State. A Claimant who pays a Court fee they did not have to pay, which they may not recover and which involves some cash flow impact on them or their Lawyers seems to me to be less likely prospect on any Government model and it is at least likely to upset the State's calculations".

Master Rowley found the correct approach to be:

"*If it is assumed that mitigation in respect of damages is akin to mitigating the extent of the costs incurred, as the Claimant acted reasonably in this case by not completing a fee remission form but simply paying the Court? In the absence of any explanation or evidence in this context, it seems to me that inevitably the question has to be answered in the negative. The assessment of costs must then proceed as if he had acted reasonably…. Which would mean there being no issue fee paid because a fee remission could have been claimed."*

The Master concluded that on the facts of the case:

"In my Judgment, a party who does not consider whether they are entitled to fee remission and, thereafter make an application if there is any doubt, risks being unable to recover that fee from their opponent. If the opponent can demonstrate that the receiving party appeared to fall within the remission scheme, the onus will be on the receiving party to justify why the Court fees were incurred. If as here, there is no such justification put forward, the fees should be disallowed under CPR 44.3. Such a party has not incurred the lowest amount it could reasonably be expected to spend. At the very least, there has to be a doubt which is to be exercised in favour of the paying party".

Whilst the Claimant was granted leave to appeal it would not appear that such an appeal was lodged.

The important thing to note with regards to both decisions is that they are not binding.

The Circuit Judge decision was described as “persuasive”, however the Master in the SCCO, a lower Court and equivalent to County Court level declined to be persuaded!

The matter is likely to remain live until such time as a binding decision is forthcoming, although whether any party would ultimately wish to proceed to the Court of Appeal for a fee at the very most of £10,000 remains to be seen.

It is also worth noting in his decision Master Rowley did find that the costs of and associated with an application for fee remission can be recovered on an inter partes basis from a Defendant. A Defendant will routinely object to payment of this work on the basis it is funding costs, as per ***Yao Essaie Motto & Ors v Trafigura Ltd (1) and Trafigura Beheer BV (2)***.

It does appear to be more than a little unreasonable that a Defendant will object to payment of a Court issue fee if a fee remission application is not made, potentially saving them £10,000, and yet also object to the costs of any such application that is made.

Not unusually for a Defendant they wish to have their cake and eat it!

Therefore, whilst a Claimant can, of course, continue to rely upon ***Ivanov*** there is an obvious risk that in the event Court fee remission was available to a Claimant and an application not made, the Court fee will not be recovered.

It is also worth bearing in mind the Defendant’s objections to Court fees ostensibly relate to the Court issue fee, as opposed to interlocutory application fees. The costs of proceeding with an application for fee remission in relation to such fees clearly outweighs any costs savings / benefit, and therefore remission arguments relate to the Court issue fee.

Q6. - Should a Court issue fee be recalculated to reflect the level of damages recovered?

It is not uncommon for a paying party to contend the Court issue fee should be recalculated to reflect either the damages recovered and/or the highest settlement offer put forward by a Claimant.

The Court issue fee is calculated on claims pleaded between £10,000 - £200,000 at 5% of the value of the claim, and where pleased at greater than £200,000 in the sum of £10,000.

If for example, at the point of issue the Claimant quantified the claim in excess of £200,000 thereby incurring the £10,000 fee, but ultimately recovered damages of say, £85,000, a paying party may contend the claim was overquantified, and the Court issue fee should be recalculated to 5% of £85,000, i.e., £4,250.

We would say in our experience this is not a particularly strong or compelling argument.

The Court issue fee paid at the point of issue is based on the reasonable quantification of the claim at this point. There are significant and dire consequences for litigators who issue proceedings for a fee lower than the reasonable value of the claim, in particular the decision of ***Lewis & Others v Ward Hadaway (2015) EWHC 3503 (CH)***, where the Court found that issuing a Claim Form with a statement of value lower than the true value of the claim was an abuse of process, and therefore, limitation would not cease until the proper Court issue fee was paid.

A settlement will often take into account litigation risk particularly in the event for example that liability has been denied, and it would simply be inconceivable and inconsistent for a Claimant

to issue proceedings with a value below the sum they had reasonably quantified/pleaded the claim at.

Therefore, unless a paying party can persuade the Court that, for example, there has been a deliberate over-pleading or over-exaggeration of the claim, it is difficult to see as to how such an argument would find favour with the Court given hindsight has no application on the determination of whether the correct Court fee was paid.

The level of Court fee payable is not based on the level of damages recovered – that is clear within the CPR and a reasonably paid Court issue fee should stand recovered as claimed. (obviously subject to any Court fee remission arguments!).