NWL COSTS LAWYERS

Costs Conference

September 2021

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ACL Association of Costs Lawyers

NWL Costs Conference Programme

- **THURSDAY 16 SEPTEMBER 2021**

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	Tim Davies – Precedent T & Budget Variations
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

The decision in **ESSEX COUNTY COUNCIL V UBB WASTE (ESSEX) LIMITED (2020) EWHC 1581 (TCC)** is so useful on so many fronts.

It deals with several issues of real importance. On the Part 36 front, how should the Court approach an offer where, arguably, the requisite 21 day relevant period has not been specified? Can an invalid offer somehow be transformed into a good one if the offeree fails to raise a challenge at the time? What is the effect of rounding off an offer by asking the offeree to inform you of any defects within it?

The judgment also carefully considers what aspects of litigation activity could warrant an award of indemnity Costs.

The Judge was Pepperall J who, when Ed Pepperall QC, was responsible for the overhaul of Part 36 which took place in 2015. His knowledge of the subject is second to none and he continues to be a contributor to 'The Supreme Court Practice'.

The litigation concerned the future of a 25 year long contract worth £800m. The claimant spent £15m in successful pursuit of the claim and in defending a very large counterclaim. Damages of £9m were awarded as was an interim payment of £8m on account of costs. This, the 3rd judgment generated by the case, concerned Costs. The two core issues were the validity of a purported Part 36 offer and whether aspects of conduct warranted an award of indemnity costs being made against the defendant. The claimant Solicitors wrote to those acting for the defendant on the 7th March making an offer specifying the 21 day relevant period as running from the date of their letter. CPR 36.7(2) stipulates that offers are made when served. The letter was sent by fax after 4.30pm on the 7th and so was deemed to have been served under CPR 6.26 on the following day. D argued that this meant the relevant period was less than 21 days and so was invalid for Part 36 purposes. The Judge found that a reasonable person aware of the circumstances would appreciate that the letter was plainly intended to be a Part 36 offer and the 21 day period ran from the date made i.e. March 8. The guiding principle is "validate if possible" as Lewison LJ elegantly stated in **DUTTON V MINARDS (2015) EWCA Civ 984.**

Pepperall J relied upon **C V D (2011) EWCA Civ 646** where Stanley Burnton LJ stated [84]: "Any ambiguity in an offer purporting to be a Part 36 offer should be construed so far as reasonably possible as complying with Part 36. Once it is accepted that a time-limited offer does not comply with Part 36, one must approach the interpretation of the offer in this case on the basis that the party making the offer, and the party receiving it, appreciated that fact". Do note that since 2015 it has been possible to make a time limited offer under Part 36.

The Court of Appeal has observed on a number of occasions that "Part 36 is highly prescriptive (so that even experienced lawyers may fail to make a compliant offer)" said Burnton LJ in **WEBB V LIVERPOOL WOMENS NHS FOUNDATION TRUST (2016) EWCA Civ 365.** Coulson LJ wearily observed that "The law reports are over-full of cases in which parties made offers outside the scope of Part 36 and then unsuccessfully sought to obtain the Part 36 benefits later" in **KING V CITY OF LONDON CORPORATION (2019) EWCA Civ 2266**. He cited **MITCHELL V JAMES (2004) 1WLR 158** where it was held that an offer which was inconsistent with Part 36 on the right to costs was not valid under the Rule.

The simple solution? Citing the advice found in the 'White Book', Pepperall J urged all practitioners to make offers in the prescribed Court Form N242 A. It is user friendly and contains helpful reminders about essential requirements eg a minimum relevant period of 21 days. Whilst use of the form is not compulsory, the wise would act as if it were! By all means write a side letter if you want to set out the rationale of your proposal. Critically, the Court will have regard to the form alone. Complete that accurately and all should be well.

At trial it was clear that the outcome secured by the claimant was at least as advantageous as the terms of their offer. Unusually, it did not seek any monetary reward but proposed a series of declarations. This is a rare example of a Court having to gauge success in the absence of any figures.

Obiter, the Court firmly rejected a suggestion that an offer which did not satisfy the formal requirements of CPR 36.5 could somehow be rendered valid if the offeree did not promptly take issue with the defect. As we know from the seminal decision in **GIBBON V MANCHESTER CITY COUNCIL (2010) EWCA Civ 726,** the measure is a strict procedural code and offers are either valid or not; there is no halfway house. The activity or indeed inactivity of the offeree cannot validate that which was defective from the outset.

Again obiter but coming from one who knows this area intimately, Pepperall J gave short shrift to a term that many have appended to offers. The gist of it was to impose a requirement upon the offeree to flag up any perceived flaws. At paragraph 37.5 he says "as a matter of policy, the responsibility for ensuring that an offer is compliant with Part 36 should lie squarely upon the offeror and his lawyers. "This must surely be correct. A good offer generates a "raft of enhancements" as it was elegantly described in **CALONE CONSTRUCTION LIMITED V DAWNUS SOUTHERN LIMITED (2019) EWCA Civ 754**. Getting the offer right is the obligation of the offeror. Inviting the offeree to point out defects thus appears pointless.

Part 36 makes available the following potential benefits.

- a good offer trumps fixed costs;
- A good offer means indemnity costs where there is no test of proportionality and one gets the benefit of the doubt on a disputed item;
- one can look to recover more than the last agreed or approved budget since CPR 3.18 is only concerned with standard basis costs;
- Interest on both damages and costs can be recovered at a rate not exceeding 10% above base rate;
- extra damages of up to £75,000;
- where a good offer is made on costs then a similar uplift is available again capped at £75,000.

The second aspect of the judgment addressed 3 aspects of conduct by the defendant. Indemnity costs for the lifetime of the litigation were sought by the claimant. The appropriate test was set out in **EXCELSIOR V SALISBURY (2002) EWCA Civ 879.** The critical requirement was "some conduct or some circumstance which takes the case out of the norm".

At trial, the defendant asserted that Council employees had failed to act in good faith. Whilst it was never alleged that they had acted in bad faith, the Court considered that allegations of sharp practice without a shred of supporting evidence was "out of the norm". Parties cannot make unjustifiable allegations of a lack of good faith with impunity. This in itself warranted an award of indemnity costs. To try and distinguish alleged lack of good faith from bad faith was a miserable exercise in sophistry.

Secondly, a counterclaim was pleaded at £77m and by trial was approaching £100m. Pepperall J categorised it as both weak and opportunistic. It was calculated to put improper pressure upon the claimant. This was a further ground to justify indemnity costs.

Many a claimant will have experienced the blockbuster counterclaim which dwarfed by far the originating claim. It is of course possible that the counterclaim is legitimate but I surmise that a Judge will ask themselves why, if the defendant were due a vast amount, it had not itself vigorously launched proceedings?

Finally, the expert instructed by the defendant was hopelessly compromised and could never have been seen as impartial. His organisation had worked closely with the defendant in the past. This undermined the evidence adduced by the expert. The conduct of an expert can justify indemnity costs in respect of costs they generate; **WILLIAMS V JERVIS (2009) EWHC 1837 (QB).**

Consequently, there were ample grounds to justify an award of indemnity costs (and interest under Part 36 at the maximum!).

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.

Even more helpful for the receiving party is **TELEFÓNICA V OFFICE OF COMMUNICATIONS (2020) EWCA Civ 1374** where (at paragraph 46) the Court explained that a successful claimant should get all of the available rewards. The pick and mix philosophy does not apply. The offer represented 96-97% of a binary claim. D conceded that C should recover indemnity costs and the Jackson uplift of £75,000, small beer where the award was £54m. Interest was wrongly denied by the Trial Judge. The Appeal Court granted enhanced interest upon the damages which amounted to a useful extra £900,000.

With respect, ought D to have made the concession? Having done so it could not argue that the offer wasn't a genuine effort to settle. At paragraph 44 of the transcript Phillips LJ gently hinted that this was not a genuine effort to settle. I am grateful to Ben Williams QC who appeared for the successful appellant.

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 2021 White Book at page 1299 identifies the total lack of an arguable defence and states that the case "should not generally be seen as encouragement to claimants to make exceptionally high offers".

Despite being in the Rules for ages, CPR 36.13 (4) (b) generated concern after the case of **PALLETT V MGN LIMITED (2021) EWHC 76 (Ch)**. This hearing came about because the defendant had waited for 22 days to elapse before accepting the Part 36 offer made by the phone hacked claimant; "It appears that that was deliberate".

Where acceptance is after the expiry of the 21 day relevant period CPR 36.13(4) stipulates that the liability for costs must be determined by the court unless the parties have agreed the costs. Had the offer been accepted the day before the claimant would have enjoyed an unassailable right to recover costs! Mann J was clearly bemused by this scenario stating that "odd though it may seem" Ben Williams QC for the defendant was plainly right in opening up a costs dispute.

Whilst the Rule opens the door for a costs enquiry CPR 36.13(5) goes on to give a clear steer that, unless unjust, the court must order that the claimant be awarded costs up to the date on which the relevant period expired. The conduct of the claimant in the dispute was irreproachable and so she recovered her costs.

Allowing a defendant the perverse opportunity to delay and then argue costs was recognised as unpalatable by the Rules Committee when it met in May. A sub-committee was sent away to sort things out. Anticipate reform shortly.

Everyone should note the advice of the excellent Lambert J in **CAMPBELL V MOD (2020) Costs LR 1** about what to do when confronted by a Part 36 offer when evidence was incomplete; seek a stay so as to stop costs running on! She said that everyone must "keep in mind the salutary purpose of the Part 36 regime which is to promote compromise and avoid unnecessary expenditure of costs and court time. A novel point arose in **MEF V ST GEORGE'S HEALTHCARE NHS TRUST (2020) EWHC 1300 (QB)**. The question at the heart of the appeal was whether a "Calderbank" offer to settle (without express time limit) could be accepted once the relevant substantive hearing (here, a detailed assessment hearing) had commenced or whether such an offer lapses at the commencement of the hearing.

Mr Justice Morris with Master Howarth assisting him as assessor heard the appeal from the decision of Master Rowley. It had been decided at first instance that since a Calderbank offer is contractual in nature, the issue was a simple one of offer and acceptance. Master Rowley, having regard to the history of the matter, held that the offer indeed remained open for acceptance after the commencement of the 3 day hearing. Acceptance towards the end of day 2 was effective. D could have imposed a deadline for acceptance of its offer or could have withdrawn the offer before or during the detailed assessment.

Had it made a Part 36 offer, permission of the Court would be required for acceptance after the hearing began: see CPR 36.11(3) (d). Where the offeree is doing badly at trial it is most unlikely that such permission would be granted. See the useful guidance from Morgan J in **HOUGHTON V PB DONOGHUE (2017) EWHC 1738 (Ch).**

By Rule change implemented on 6th April 2021 Part 36 offers cannot exclude interest (**KING** codified) but a trailing interest provision running from the end of the relevant period is permitted (**CALONNE** codified). The SCP 2021 at page 1278 suggests that "claimants might well wish to include some such provision in their offers since otherwise they will not be able to recover any additional interest upon late acceptance".

Part 1 of the CPR has also been amended. Henceforth, the overriding objective at CPR 1.1(2) (a) declares that dealing with a case justly and at proportionate cost shall include ensuring that parties are on an equal footing and can participate fully in proceedings and that parties and witnesses can give their best evidence.

Belated recognition of vulnerability is fleshed out in a one page long Practice Direction 1A. It explains that vulnerability, be it of a party or witness, may impede participation and also diminish the quality of evidence tendered.

A vulnerable person is one adversely affected by a factor, be it personal or situational, temporary or permanent, that might affect their trial participation or delivery of evidence.

There is no attempt at a comprehensive definition of disability. Examples cited include age, literacy, health, having witnessed a traumatic event, social or cultural circumstances.

The Court needs to consider whether the perceived vulnerability would affect, for example, the ability of the individual to give instructions, comprehend the proceedings and put evidence forwards.

Parties and Court should strive to identify the vulnerable at the earliest stage of the proceedings. By paragraph 8, upon identifying vulnerability consideration should be given to "ground rules" prior to the witness giving evidence. This could specifically address the conduct of advocates and support mechanisms necessary to mitigate the impact of vulnerability.

Part 44.3 (5) which sets out the proportionality test acquires a new paragraph (f) declaring that account must be had to any additional work undertaken or expense incurred due to the vulnerability of a party or any witness.

Be cautious about the Court of Appeal decision in **ZUBERI V LEXLAW LIMITED (2021) EWCA Civ 16.** What the Court decided was that a provision empowering a Solicitor to charge for time expended were a DBA to be terminated was valid. It was outside the DBA. Could though one have a hybrid arrangement whereby a Solicitor acted under a DBA but could charge something if the case failed? Newey LJ said no. Lewison LJ said yes. In a wonderful piece of contortion Coulson LJ agreed with both of them! The maximum deduction permitted is 50% inclusive of interest and the fees of Counsel.

The Master of the Rolls has approved an increase in guideline hourly rates. Whilst formal implementation is on October 1st, some Courts have jumped the gun and started to apply them. See **ECU V DEUTSCHE BANK (2021) EWHC 2083 (Ch)** and **AXNOLLER V BRAKE (2021) EWHC 2362 (Ch)**. Our senior Costs Judge in an interview last December was emphatic that the changes were not intended to be retrospective. The M.R. has indicated a further review in just 2 years time .

It now looks certain that next April the Judiciary will be granted powers to order litigants to engage in Alternative Dispute Resolution. A 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**; **DSN V BLACKPOOL FC (2020) EWHC 670 (QB) and BXB V WATCH TOWER (2020) EWHC 656(QB).**

Fixed Costs

1. On 6th September 2021 the Ministry of Justice published final proposals for the introduction of fixed costs in many, but not all cases, worth between £25,000 and £100,000.

2. In January 2017 Lord Justice Jackson invited me to visit him. I had been advising him on reform of costs and procedure since 2011.

3. He told me in strictest confidence that he had been thinking about how fixed costs could be extended in civil litigation. The idea was hardly new. Lord Woolf MR suggested them in 1999. Little had been done save in low value personal injury cases.

4. He outlined his scheme which the Government has now endorsed in almost every respect. I am absolutely certain that the reforms will be implemented. In December 2020 the Senior Costs Judge said , outside of court , that the necessary rules would take a considerable amount of time to perfect. My view is that the changes will be implemented in either October 2022 or April 2023. Most Rule changes happen in either of those months.

5. The new Rules will only apply to cases where the cause of action accrued on or after the date of reform. This means that their impact will be softened. Say the Rules were introduced on October 1st 2022. A claimant hurt in a September 2022 accident would have 3 years to bring a claim. If they only sued in 2025 the case might not be resolved until 2027. They would be entitled to recover costs at large (unfixed) 5 years after the new measures took effect.

6. Clinical negligence cases are not captured by these changes. Sir Rupert at the first of our meetings in 2017 made it absolutely clear that he was only looking to fix costs in straightforward matters. The Health Department did look at fixed costs back in 2017.

7. Cases arguably worth over £100,000 will carry on as usual.

8. Fixed Costs will bring about significant change. There will be no budgeting at the start nor detailed assessment at the end of a case. Costs will be determined by reference to a costs matrix. Four bands of work are identified with the bottom being credit hire and bent metal claims and the top being professional negligence cases and commercial disputes. Personal injury matters will be in one of 2 middle bands allocated by reference to perceived complexity.

9. It may be in years to come that the £100,000 ceiling is lifted to, say, £250,000 but I do not see that eventuality coming about, if ever it does, before 2028.

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Costs Budgeting – Staying on Track with Precedent T

Presented By Tim Davies

Association of Costs Lawyers

Revising your Budget

Topics

- Procedure
- Precedent T
- What are Significant Developments?
- Importance
- Practical Points
- Solicitor/Client implications

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Recap – a year on

CPR Part 3 II Costs Management

- 1st October 2020
- *"Revision and variation of costs budgets on account of significant developments ("variation costs")"*
- Court may vary the budget for costs relating to the variation which have been incurred since the original Costs Management Order

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The Starting Point

CPR 3.15A

(1) A party ("the revising party") must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions.

Key:

- "Must"
- "Upwards"
- Or "downwards"!
- Significant Development

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Serve, Promptly

Submit promptly to other parties for agreement

- Do not apply to or file with Court in first instance.
- Promptness is "very fact-sensitive".
- Limited to additional costs generated by the significant development.
- Certify the variation costs have not been claimed previously.
- Precedent H Assumptions, together with Judge's observations at the CMC/CMO, will assist.

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Precedent T

A closer look:
https://www.justice.gov.uk/downloads/courts/cpr/precedent-t.xlsx

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Significant Development

Al-Najar & Ors v The Cumberland Hotel (London) Ltd (2018) EWHC 3532 (QB)

- Whether a development is "significant" is a question of fact depending on scale and complexity of what has occurred.
- Should have been reasonably anticipated? Probably not significant.
- But doesn't need to be outside the normal course of litigation.
- Bar high, but not too high?
- "Reasonable and proportionate".

Thompson v NSL Limited (2021) EWHC 679 (QB)

- Concept of "a development".
- Need not have a specific triggering event.
- Significant development in one Phase can impact on later Phases.
- Extent of impact on costs known before applying to vary.

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Next Steps

- Time to attempt agreement with the other side.
- Must send to Court, whether variation agreed or not.
- Promptly.

The Court will consider the proposed variations and will:
- Approve
- Vary
- Disallow

Or list a further costs management hearing (likely by phone/writing).

Remember - Phase costs must still be reasonable and proportionate.

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Outcome

New Costs Budget totals:
- By Phase
- And overall.

Importance:
- New and stronger platform from which we can benefit from CPR 3.18.

Providing we are on/under Budget…

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CPR 3.18

In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –

(a) have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings;

(b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so; and

(c) take into account any comments made pursuant to rule 3.17(3) and recorded on the face of the order.

- "Not depart" – get paid; get a high POA costs.
- Budget must have remained relevant to the case.
- "Good reason" - Unreasonable failure to apply to vary during the case could hurt.

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Practical Points

- Only file Precedent T unless:-
  i. Directed by the Court;
  ii. Exceptional circumstances.
- Procedure does not require a formal application – "submit" promptly to Court.
- Consider utilising an existing listed hearing to determine the point.
- Discreet issue may be capable of agreement without full procedure?
- Work covered by the 2% Costs Management cap.
- Capture significant development/budget variation work.

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Outside the Budget

CPR 3.17

- *(4) If an interim application is made but is not included in a budget, the court may, if it considers it reasonable not to have included the application in the budget, treat the costs of such interim application as additional to the approved budgets.*

- "Mechanical" costs of the Application.

- Compared with costs flowing from the Application.

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Oppressive Behaviour?

CPR 3 PD 3E

- *(13) Any party may apply to the court if it considers that another party is behaving oppressively in seeking to cause the applicant to spend money disproportionately on costs and the court will grant such relief as may be appropriate.*

- Court has wide discretion.
- But a high threshold.
- Test for oppressive?
- And need to show an intention to make us spend money.
- More likely to sit with a substantive application.
- Separate from variation procedure.

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Costs and Client Management

Costs Budgeting

- Control reasonable and proportionate sums payable inter partes.
- No strict obligation to involve the client in the Budgeting process.

But

- Good practice to advise client about the likely inability to recover costs in excess of budgeted amounts.
- Costs in excess of the Budget could be regarded as "unusual" (CPR 46.9(3)(c)).
- Advise client as to the effect of the CMO and level of approved Budget.
- And any subsequent revisions.
- Protect your basic charges to protect your Success Fee.

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Stay on Track

Of course, we can only truly benefit from Budget variations if we:

- Monitor spending by Phase against the original CMO and variations.
- Apply to vary the Budget if there is a significant development, promptly.
- And stick to the Budget!

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NWL – here to help!

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