NWL COSTS LAWYERS

Costs Conference

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ACL Association of Costs Lawyers

NWL Costs Conference Programme

WEDNESDAY 7 JUNE 2023

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
15.30-16.30	Professor Dominic Regan – Legal Update
16.30-16.55	Tim Davies, Andrew Tollitt, Matthew Grew and Tony Taylor – Q&A Session
16.55-17.00	Closing remarks
17.00-18.30	Drinks Reception

Professor Dominic Regan – Legal Update

Yet more breaches of the witness statement Rules have been reported. In **CUMBRIA ZOO COMPANY LIMITED V THE ZOO INVESTMENT COMPANY LIMITED (2022) EWHC 3379 (Ch)** the managing director of the defendant and her solicitor signed certificates of compliance despite the statement being "littered with comments and expressions of belief which can only at best be based on unattributed hearsay". "The Judge said "this witness statement involves gross non-compliance". The default was only recognised at trial. "Had this issue come in front of me at a PTR, I would have had little hesitation in prohibiting the defendant from relying on the statement". The Judge also noted at paragraph 59 that a bad statement risked undermining the very credibility of the witness, so undermining the case of that party.

Fancourt J of **GREENCASTLE** fame had another blast in **MACKENZIE V ROSENBLATT SOLICITORS (2023) EWHC 331(Ch).146.** "The four witness statements are the careful work of a legal team, contrary to the requirements of Practice Direction 57AC that a statement should be so far as possible in the witness's own words. Each statement works by making assertions about what happened, at a level of generality or summary, rather than setting out the facts as recalled in detail and resembles a position statement seeking to advance a case more than a witness statement. The summary of what happened is often an exaggeration of what is shown by the documents or just inaccurate. There were many instances in the course of the cross-examination of the four witnesses called on behalf of BM where it was evident that the witness could not in fact recall what they stated in their statement, or where what was stated in the statement was contradicted in cross-examination, or was shown to be an untenable interpretation of a document. I am left as a result with real doubt about the reliability of the content of these witness statements".

In **CORREIA V WILLIAMS (2022) EWHC 2824 (KB)** Garnham J upheld a decision about a witness statement which meant that the claimant failed outright. The claimant was a Portuguese speaker and not particularly proficient in English. Therefore, he gave instructions to his solicitor, presumably Mr de Silva, in Portuguese, who took notes in English which were then put together as a witness statement in English. Since 6th April 2020 Practice Direction 32 paragraph 18.1 makes it clear that the witness statement must be in the witness's own words and drafted in his or her own language it is therefore, in my judgment, quite plain that the witness statement is simply not a witness statement. It is not admissible as a witness statement. The defect went "to the very heart of the issue of credibility and whether or not what the claimant says can be satisfactorily relied upon". Absent any admissible evidence, the claim collapsed.

The first instance decision was made on the day of trial. Garnham J usefully quoted Davis LJ in **CHARTWELL V FERGIES PROPERTIES (2014) EWCA Civ 506**; "Appellant courts will not likely interfere with case management decisions. Robust and fair case management decisions by first instance judges are to be supported".

Coulson LJ in **QX V SECRETARY OF STATE FOR THE HOME DEPARTMENT (2022) EWCA Civ 1541** dealt with a fundamental aspect of civil litigation starting from paragraph 130. The High Court had ordered the defendant to produce a statement from a witness who should be produced for cross - examination at trial. This was manifestly wrong. Quoting Zuckerman at 11.11, party autonomy is paramount. "A party is free to choose which evidence to include and which evidence to leave out". That is a decision with which the court cannot interfere, even if the evidence in question is regarded as significant. That is part and parcel of an adversarial system.

In **BALL V BALL** 11th October 2022 HHJ Davis-White KC sitting in the Leeds Business and Property Court was confronted by a claimant who was late with witness statements, disclosure and had failed to produce a compliant bundle for a 15 day hearing set to commence 3 weeks later. The parties had 46 witness statements between them covering events back as far as 1992 (which is when the compulsory exchange of witness statements began). At paragraph 92 we find these words of wisdom. "I should make one final comment which concerns both the manner in which witness statements and applications have seemed to cascade across my computer in the hours or days before the hearings in this case and the conduct which has led to sanctions being applied in this case. I hope that this case will bring home yet again that the old way of simply assuming that, provided the solicitor gets everything and the clients get everything off their desks, at least a couple of days or even a week before a trial or hearing that somehow the judge and advocates will just muddle along and do the best they can, have long gone. Cases need to be prepared properly. Court orders need to be obeyed. That is why, and the assumption on which, orders are made in the first place".

The 2021 guideline hourly rates were invoked by the Court of Appeal in a competition case, **SAMSUNG V LG (2022) EWCA Civ 466.** LG, the receiving party sought over £1,000 a hour, asserting that rates were always higher in competition litigation. Males LJ held that rates prevailed in the absence of "a clear and compelling justification". The mere fact that the action was of a commercial or competition nature was neither here nor there. The involvement of an international element made no difference either. The maximum guideline rates are predicated "very heavy commercial work" in the first place. Paragraph 28 of the 2021 Guidance to the summary assessment states that the figures "may also be a helpful starting point on detailed assessment". The same Court deployed the rates in **ATHENA CAPITAL FUND V SECRETARIAT OF STATE FOR THE HOLY SEE (2022) EWCA Civ 1061**. Costs of the parties at £730,000 for a one day hearing "came as something of a surprise". Each party had incurred fees for Counsel in excess of £200,000. Such fees are not captured by guideline figures but "only a reasonable and proportionate fee may be recovered from the other side". Males LJ noted wryly that whilst every point was taken in the appeal no one uttered a peep about legal costs! Birss LJ added that the new London 1 rate band was based on evidence from the Business and Property Courts so that band "is directly applicable to this case". An interim payment of £100,000 was ordered. **MANEK V 360 ONE WAM LIMITED (2023) EWHC 985 (Comm)** saw the rates strictly applied despite complexity and very serious allegations being bandied about.

Just published is the Report of the Civil Justice Council in which it is proposed that there be a retrospective increase to the 2021 figures and that a new, higher band be established for heavier commercial work be it undertaken in London or elsewhere. GHRs for Counsel should be introduced. Detailed guidance on when to exceed rates is also proposed.

The other key segment of the report addressed budgeting. It is to be preserved but tweaks are proposed with a lighter touch for cases worth between £100,000 and £1m. Defendants in clinical negligence and personal injury cases are likely to be required to complete the front page summary only.

CPR 1 obliges the Court and parties to consider vulnerable witnesses. I am so grateful to HHJ Howells in Liverpool who referred me to an excellent online toolkit dealing with this issue, 'Advocate's Gateway'. Ritchie J in **GKE V GUNNING (2023) EWHC 332 (KB)** indicated that an order that the legal advisers for the claimant should see cross examination questions in advance of trial ought not to have led to the client seeing the questions too. That produced an imbalance between the parties.

The Chancellor of the High Court, Sir Julian Flaux, gave a splendid talk about PD57AD which I attended on January 18th. It can be found on the Judiciary website. He began by identifying the differences between Part 31 and the new PD. The latter is self-contained whilst Part 31

contains 23 Rules and 3 supporting PDs. The extensive guidance in 57AD was intentional. It deals with aspects of Disclosure ignored by Part 31 such as the explicit duties of client and lawyer and the unfettered obligation to disclose known adverse documents.

1. Disclosure is not left to the whim of the parties; the Court is to supervise any extended disclosure.

2. It is directed to the issues for disclosure.

3. Its scope must be limited by reference to reasonableness and proportionality.

The very function of the process is to assist with the fair resolution of the issues in the claim.

Engagement, cooperation, is essential.

Model C requests ought only to be used where the category of material sought is tightly defined such as bank statements from May 22nd to May 26th 2022.

To this day the law of Disclosure continues to evolve. See **PHONES 4U LIMITED V EE LIMITED (2021) EWCA Civ 116** where the Appeal Court upheld an order that D request 3rd parties (ex- employees) to search on their personal phones for relevant documents.

This was applied by Mr Justice Robin Knowles in **THE REPUBLIC OF MOZAMBIQUE V CREDIT SUISSE (2022) EWHC 3054 (Comm)** on 30th November 2022 where the court ordered a party to identify which current and former employees had been asked to search for documents upon their personal devices and who had so consented.

Disastrous mishandling of Disclosure in **CABO CONCEPTS LIMITED V MGA ENTERTAINMENT LIMITED (2022) EWHC 2024 (Pat)** lead to the loss of a trial date and an indemnity costs order with a payment on account of almost £580,000. Just 3 weeks before the date set for trial D told the court it had missed about 84,000 documents during their data collection process. Despite promises to the contrary, the harvesting of documents went unsupervised which meant 800,000 were missed! They should have involved an independent e-Disclosure guru to oversee the process.

In February the Supreme Court spent a day listening to argument about the legitimacy of funding arrangements in place to support group actions of which there are several on the go. The hearing concerned the truck cartel litigation, worth billions of pounds. One can watch the hearing online. Those of a delicate disposition might not want to. I dropped in for the opening of the Appeal. The Court gave the claimants a hard time.

The same court also heard the appeal against the judgment in **PHILIPP V BARCLAYS BANK (2022) EWCA Civ 318**. At first instance the claim was struck out on the basis that the bank did not owe a duty of care to the claimant. She and her husband were retired. A fraudster deceived the couple into transferring £700,000, the bulk of their life savings, to a bank in the United Arab Emirates where the funds vanished. The transfers were utterly out of character yet the bank obligingly moved the money on. The Court of Appeal unanimously held there to be an arguable case which should proceed to a full trial. The banking fraternity is terrified of the ramifications. The leading case to date on this subject is **BARCLAYS BANK V QUINCECARE (1992) 4 AER 363.** Lord Leggatt who has demonstrated a tendency to lob verbal grenades in every case I have seen, languidly suggested that perhaps **QUINCECARE** was wrongly decided. When will we get a judgment?

Sir Barry Cotter was appointed to the High Court Bench in 2021 after a decade as a Circuit Judge. He was particularly conversant with injury claims whilst at the Bar. In 2009 he won an

award as personal injury barrister of the year and he edited editions of 'Munkman on Employer's Liability'.

The judgment in **MUYEPA V MOD (2022) EWHC 2648 (KB)** has generated shockwaves generally because it covers so much territory including credibility, fundamental dishonesty and evidence. This was a claim for a non-freezing injury allegedly sustained on a military training exercise in Wales.

At the outset every expert needs to be familiar with 3 sources. The first is the Rule itself, CPR35. The second is the brief but important Practice Direction, PD35, in which paragraph 3.2 itemises all that a report must contain and paragraph 3.3 sets out the crucial statement of truth. The final source is the Guidance for the instruction of experts in Civil Claims. Published by the CJC it is found in the White Book at 35EG, immediately after the previous 2 measures.

PD35.2(9) demands that the report must contain (as well as the concluding statement of truth) a statement that the expert;

(a) understands their duty to the court, and has complied with that duty;

(b) is aware of the requirements of Part 35, this Practice Direction and the Guidance for the Instruction of Experts in Civil Claims 2014.

This statement was absent from 3 reports that the claimant adduced in **AL NEHAYEN V KENT (2016) EWHC 623 (QB)** leading the court to exclude the lot as evidence. Again, in an £11m action, **DANA UK AXLE LIMITED V FREUDENBERG (2021) EWHC 1413 (TCC)**, all 3 reports for the defendant were excluded on account of multiple breaches of the Rule, PD and the guidance.

When instructing an expert always ask them to confirm familiarity with these materials. Volunteer to supply copies if required.

The instruction of an obviously compromised expert lead to an award of indemnity costs in **ESSEX COUNTY COUNCIL V UBB WASTE (2020) Costs LR 1259**. See paragraph 75 of the costs judgment which is also sublime on aspects of Part 36.

MUNDY V TUI UK LIMITED (2023) EWHC 385 (Ch) Collins - Rice J deprecated the practice of claimants routinely making a 90/10 liability offer to settle. This was a holiday sickness claim. At trial the claimant was awarded £3,805.60 which fell below the defendant's Part 36 offer of £4,000. The claimant asserted that having been successful in full he had bettered his liability offer. The Judge was having none of it. She said at paragraph 41 "It makes a 90/10 liability offer into a means for a claimant, who fails to beat a money offer to settle his claim, to recoup a substantial premium for 'winning' the case nevertheless. It is, in other words, an attempt to use CPR 37.17 against itself, contrary to both its letter and its spirit".

In **AVANTAGE (CHESHIRE) LIMITED V GB BUILDING SOLUTIONS (2023) EWHC 802 (TCC)** it was accepted that an expert had fallen seriously ill and had to be replaced. This was emphatically not an expert shopping case and so no order for production of her report was made. (As to shopping orders see **VASILOU V HAJIGEORGIOU (2005) EWCA Civ 236** and **BECK V MOD (2003) EWCA Civ 1043).**

The Court did direct production of notes taken by her of site inspections and interviews because they contained relevant, primary information that was not available to the other experts.

6th April brought 2 important reforms to the CPR. PD6A4 is amended to provide that where a party has indicated that service by email must be effected by sending a document to multiple addresses, good service will be secured by sending it to any 2 of the addresses specified.

The explanatory note to the **CIVIL PROCEDURE (AMENDMENT) RULES 2023** declares that the effect of the Rule change is;

rule 44.14 (effect of qualified one-way costs shifting) —

(i) to allow the court in cases falling within the scope of the qualified one-way costs regime to order that the parties' costs liabilities be set-off against each other**, Ho** having previously found that this rule, properly construed, did not allow the court to do so; and

(ii) to include within this rule, as well as **deemed orders, agreements to pay damages or costs,** so to allow the off-setting of costs orders made in favour of a defendant and ensure that offers made under Part 36, and, for example, settlements concluded by way of a Tomlin Order, come within the rule;

Only cases **issued** on or after 6th April are caught.

Note the possibility of a defendant arguing premature issue by those seeking to retain the existing benefits of QOWCS. A claim ought not to be issued within the Protocol period unless limitation is looming.

Is there anything a defendant could do if a case were issued in breach of protocol? Yes! It could seek to have the action struck out as an abuse of process under CPR 3.4 (2) and a later reissued one would then be captured by the new Rules.

In **CABLE V LIVERPOOL VICTORIA INSURANCE CO LTD (2020) EWCA Civ 1015** the Court of Appeal intimated that a breach of protocol could amount to an abuse of process. This develops **JSC VTB BANK V SKURIKHIN (2020) EWCA Civ 1337** where at paragraph 51 Phillips LJ said "….proceedings can be struck down as an abuse of process where there has been no unlawful conduct, no breach of relevant procedural rules, no collateral attack on a previous decision and no dishonesty or other reprehensible conduct". The White Book commentary is found at .3.4.17.

Before disappearing down the rabbit hole that is **BELSNER V CAM LEGAL SERVICES LIMITED (2022) EWCA Civ 1387** let me spell out one almighty truth. It is utterly proper for a solicitor to make a deduction from damages which have been recovered on behalf of a client. Sir Rupert Jackson in his 'Review of Civil Litigation: Final Report' (page xvii) spoke of the need to see that damages were not being "substantially eaten into by legal fees". He went on to observe it beneficial "that claimants have an interest in the costs being incurred on their behalf". Sir Rupert said expressly at [1.4] in his Review of Civil Litigation Costs: Supplemental Report: "[g]iven the multifarious kinds of litigation it is not feasible to preordain how much clients must pay to their lawyers in every individual case. Also, that would be an unacceptable interference with freedom of contract. The best that we can do is to restrict the recoverable costs".

The duty owed by a solicitor to a prospective client in all cases is brilliantly set out by Roger Mallilieu KC at page 697 of the 2023 edition of 'Costs & Funding following the Civil Justice Reforms: Questions & Answers'. "A solicitor's duty is to consider, at the outset (i.e. at the time the client first seeks to instruct the firm) what forms of funding are reasonably available to the client and to advise the client accordingly". Appreciate that it is incumbent to advise on funding options that you would never offer "with the result that the client chooses to instruct a different

firm". Roger concludes by saying that it is then entirely proper to specify the only terms upon which you are willing to act. A wealthy client might insist that a senior partner should exclusively handle their dispute. That is a luxury, the cost of which would never be remotely recoverable. Tell the client so. The Appeal Court was perturbed by a solicitor failing to explain how much was likely to be recoverable in costs from an opponent. The client should have a clear understanding of the economics of their claim. Was it worth pursuing?

Fixed Costs Rules for most cases worth up to £100,000 are to be implemented on October 1st. Personal injury aside, the measures will surprisingly apply to relevant cases issued from that date, so the reforms will have immediate effect. For injury, the Rules will only apply where the cause of action accrued on or after October 1st. In disease cases, the all important date is that of the letter of claim. At the time of writing (May 21st) the final Rules have not been published.

In the pipeline are measures empowering the court to order ADR which Lady Justice Asplin told me are progressing well.

Q&A Session

Q: The Defendant has served surveillance evidence (PI/CN). The case is costs managed but no provision was made for surveillance evidence in the Budgets. Do I need to apply to revise my Budget?

A: Yes, No, Maybe!

The Law

"Significant Development" (CPR 3.15A (1)) - The revising party must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions.

"Good reason" to depart from the Budget (CPR 3.18 (b)) – The Court will not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so.

Considerations

- A unique area of work where it's unlikely such costs were factored into the Budget.
- Very case and fact specific.
- Can be far reaching and certainly a "significant development".
- Wide spectrum of captured behaviour.

Phases Impacted

- Issue/Statements of Case – amend pleadings?
- Disclosure – may well require additional/updated records?
- Witness Statements – consider Defendant's and will need further statement(s) to counter?
- Expert Reports – further input from causation, C&P/quantum experts?
- Trial Preparation – Increased work? Allegations of fundamental dishonesty in play?
- Trial – Potential increase in Trial ELH depending on severity of allegations? Preliminary Issue?
- ADR/Settlement - likely to be harder and more involved?
- Defendant's application for permission - outside the Budget (CPR 3.17 (4))

Options

1. To do nothing is not an option.
2. Prepare and serve a revised Budget immediately?
3. Revise the Budget once the true extent of the impact of the evidence becomes clearer?
4. Agree the associated costs are outside the Budget/amount to good reason to depart?

Depending on facts, likely approach will be Option 3, or Option 4.

Further Thoughts

Remember also to consider the impact from a Solicitor/Client perspective.

Unlikely we will recover from the Defendant all the costs of "defending" the surveillance issues.

Advise client on costs implications, potential for increased shortfall/deduction from damages etc.

Q&A Session

Q. We need to apply for a deduction from a client's damages – can you help?

A. Yes, are you sitting comfortably...

Solicitor/client deductions are becoming more commonplace and are for larger sums.

Certain rules cover several different circumstances.

A number of strands must be pulled together.

Certain basic questions follow

- Whether the client is a child or protected party.
- What deductions you are seeking.
- What advice has been given to the client or litigation friend.
- Does the client agree to the deductions?
- Do we need a detailed assessment?

SCCO Guidance, fairly well-known, helps –

https://www.judiciary.uk/announcements/practice-note-by-the-senior-costs-judge-deductions-from-damages/

Case law can assist to show some pitfalls or the attention to detail that is needed.

BCX v DTA [2021] EWHC B27 (Costs) (16 December 2021)

A deduction may not be possible.

Menzies v Oakwood Solicitors [2022] EWHC 3199 (KB)

A "settlement of account" is not the same as "a statement of account."

MNO v HKC & Anor [2022] EWHC 2919 (SCCO)

Consent is not informed consent.

Finally, deductions can be significant, take the steps needed to ensure the client is informed and content, then the process can be productive.

Q&A Session

Q. Should I provide a breakdown of the Expert and Agency Fee Note?

A. Yes/No?

The Issue
Is a receiving party required to provide a breakdown between the cost of an expert report and the costs of a Medical Reporting Organisation ("MRO") approached to provide the report, or is it permissible for the receiving party to submit a bill which simply includes the fee charged by the MRO to provide the medical report?

The Law
CPR PD 47 Paragraph 5.2 States:
"On commencing detailed assessment proceedings, the receiving party must serve on the paying party and all the other relevant persons the following documents —
…(c) copies of the fee notes of counsel and of any expert in respect of fees claimed in the bill.

The Judgment
In a judgment given by HHJ Bird in ***Northampton General Hospital NHS Trust v Hoskin – County Court at Manchester –*** The judge ordered that bills for expert reports rendered by an agency should be broken down so that the paying party could see the amounts being charged by the expert. In default of compliance the expert's fees were to be assessed at nil. The claimant argued that there is simply no requirement for a breakdown under the rules. The defendant argued that the MRO is not an expert and so its invoice cannot be regarded as an expert fee note under CPR PD 47 paragraph 5.2 or work done by an agent under CPR PD 47 paragraph 5.12.

Paragraph 22 of the Judgment stated:

"*I am satisfied that it is clear that PD 47 imposes a duty on the receiving party to provide the fee note of any expert instructed and, where such costs are claimed details of the costs of any MRO. Premex is not an expert. Its invoice cannot be described in any sensible way as a fee note and is in any event not the fee note of the expert".*

It should be noted that this decision is persuasive and not binding and only applies to cases where detailed assessment proceedings have been commenced. However, if no breakdown is provided this judgment may put you in breach of PD47.

It is also interesting that at first instance the defendants' objections before the Regional Costs Judge were rejected and he believed the fee note did not breach the CPR, but it was incumbent on the receiving party to be as clear and coherent as possible in setting out such calculations and how the figures are reached. In effect the Judge who dealt with the assessment could take a view as to what to allow as a fair and reasonable figure depending on the documentation.

It is also understood that this matter is to go to the Court of Appeal and therefore it may be that the issues surrounding the breakdown of Medical Agency fees will be stayed until there is a definitive and binding decision from the Court of Appeal - but this should not affect the remainder of the bill which can be assessed.