COSTS NEWSLETTER

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Farrar's Building News

Clive Thomas, Editor

Welcome to the spring edition of Farrar's Buildings' costs newsletter. In this edition **Helen Hobhouse** considers two recent Court of Appeal decisions on the issues as to whether the personal injury fixed costs regime applies to pre - action disclosure applications and those claims that were commenced within the portal but were subsequently re - allocated to the Multi - Track.

James Plant provides some much needed insight as to whether the late acceptance of a Part 36 offer by a defendant entitles a claimant to recover costs on the indemnity basis. I have considered the High Court decision in *Merrix v Heart of England NHS Foundation Trust* [2017] EWHC 346 in which the court determined that when assessing costs on the standard basis the court will not depart from the receiving party's approved budget unless there is good reason to do so.

Finally **Robert Golin** provides a comprehensive round up of some of the more notable costs cases of recent months

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Fixed Costs

By Helen Hobhouse

Introduction

Qader v Esure Services Limited [2016] EWCA Civ 1109

Sharp v Leeds City Council [2017] EWCA Civ 33

In these two recent cases the Court of Appeal has taken the opportunity to clarify two issues which have been troubling personal injury practitioners for some time. Firstly, whether the fixed costs regime applies in cases which start under the RTA or EL/PL Protocol but which are then allocated to the multi-track and, secondly, whether the fixed costs regime applies to applications for pre action disclosure if the claims start in the RTA or EL Protocol.

In *Qader* the court was concerned with RTA claims. It was acknowledged, however, that the court's conclusions would apply with equal effect to those started under the EL/PL Protocol.

Mr Qadar and his two passengers brought personal injury claims following a road traffic accident on 25th October 2013. The claimants submitted their claims under the RTA part of the Protocol Portal but the claims left the Protocol following the defendant's denial of liability. The claimants then issued Part 7 proceedings valuing their claims at between £5,000 and £10,000. In their defence the defendants alleged that the claim was fraudulent in that the claimant driver had deliberately induced

the collision by suddenly applying his brakes. The defendant also disputed whether the claimant passengers were in the vehicle at the time of the collision.

In view of the serious nature of these allegations the case was allocated to the multi-track but at a subsequent CCMC the district judge held that the claim was subject to the fixed costs regime by virtue of CPR 45.29. The claimant's solicitors appealed, arguing, inter alia, that it could not have been the intention of the Civil Procedure Rule Committee to limit claimants and their solicitors to fixed costs in cases where claimants were facing serious allegations of dishonesty and where the conduct of the proceedings was likely to result in legal costs being incurred which were significantly in excess of the fixed costs permitted under the fixed costs regime.

The appeal to the circuit judge was unsuccessful and the appeal then proceeded to the Court of Appeal.

Lord Justice Briggs, delivering the lead judgement, recognised that there were a number of situations where claims started in the RTA Protocol might ultimately end up being allocated to the multi-track i.e.

- claims originally thought to be worth no more than £25,000 but where the claimant's condition had deteriorated or failed to improve leading it to be re valued at a much higher sum;
- claims involving substantial credit hire charges;
- claims involving serious allegations of fraud.

In each of these cases the complexity of the litigation, the likely involvement of disputed expert evidence and the knock on impact on the length of trial would inevitably lead to an escalation in costs.

The Court of Appeal accepted that CPR 45.29B was unambiguous,

"if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31st July 2013, the ***only*** *costs allowed are;*
(a) the fixed costs in rule 45.29C, and,
(b) disbursements in accordance with rule 45.29I"

The Court was nevertheless persuaded that the failure to provide for the exclusion of multi-track cases from the fixed costs regime must have been a drafting error on the part of the Civil Procedure Rules Committee. The Court therefore exercised its exceptional powers to give effect to the Committee's actual intentions.

Following the Court of Appeal's ruling in *Qader* CPR 45.29B should now to be re-read as

> *"**for so long as the claim is not allocated to the multi-track,** if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31st July 2013, the only costs allowed are;*
> *(a) the fixed costs in rule 45.29C, and,*
> *(b) disbursements in accordance with rule 45.29I"*

Sharp v Leeds City Council was a case in which the claimant brought a personal injury claim against the local authority following a fall on a defective paving slab. A Claim Notification Form (CNF) was loaded onto the Portal pursuant to the EL/PL Protocol. The claim was disputed and the claim then came out of the Portal and the CNF was then treated as a Letter of Claim within the Personal Injury Protocol.

The claimant's solicitors sought disclosure of the inspection records but the local authority failed to respond and the claimant therefore issued an application for Pre Action Disclosure. By the time the application came before the court the local authority had provided the necessary disclosure and the only outstanding issue was the question of costs. The claimant argued successfully at first instance, but unsuccessfully on appeal to the circuit judge, that she should not be limited to fixed costs.

The difference between the fixed costs (£305) and standard costs (£1,250) was a relatively modest one but it was agreed that the issue gave rise to important practical consequences in terms of the costs/benefit of making pre action disclosure applications in low value personal injury claims and the claimant's solicitors were accordingly given permission to appeal to the Court of Appeal.

Lord Justice Briggs rejected the claimant's arguments that a pre action disclosure application should be treated as a separate and self-contained application with its own separate jurisdiction and procedural rules and costs regime. In his view the application had to be treated as an "interim application… in a case" to which Section IIIA of Part 45 applied – Part 45.29H.

> *"It is plainly an application for an interim remedy within the meaning of Part 25, and it is in my view "interim" in the fullest sense, because it follows the institution of the "claim" by the uploading of a CNF on the Portal, even though no proceedings under Part 7 have yet been issued, and precedes the resolution of the claim by settlement or final judgment"*

Lord Justice Brigg's approach to this issue was also heavily influenced by what might be described as policy considerations

> *"The starting point is that the plain object and intent of the fixed costs regime in relation to claims of this kind is that, from the moment of entry into the Portal pursuant to the EL/PL Protocol (and for that matter, the RTA Protocol as well) recovery of costs of pursuing and defending the claim at all subsequent stages is intended to be limited to the fixed rates of recoverable costs, subject only to a very small category of clearly stated exceptions. To recognise implied exceptions in relation to such claim related activity and expenditure would be destructive of the clear purpose of the fixed costs regime, which is to pursue the elusive objective of proportionality in the conduct of small or relatively modest types of claim to which that regime applies".*

In response to the claimant's counsel's representations that the very limited recovery of expenditure on pre action disclosure applications might encourage defendants to ignore their pre action disclosure obligations it was said that if there was good evidence that this was in fact occurring then the appropriate course would be for the matter to be reviewed by the Rules committee with a view to increasing the fixed sum recoverable on pre action disclosure applications.

Merrix v Heart of England NHS Foundation Trust, [2017] EWHC 346 (QB)

By Clive Thomas

Summary

In a case where a costs management order has been made, the court when assessing costs on the standard basis , will not depart from the receiving party's last approved or agreed budget, unless satisfied that there is good reason to do so. This applies where the receiving party is claiming for costs that are equal to or less than the sums budgeted or where it is seeking to recover more than the sums budgeted.

Background

The appellant brought a claim for clinical negligence against the Defendant Trust which was compromised following exchange of medical evidence. The case had been subject to cost budgeting.

The appellant argued that as her claim for future costs were less than the budgeted figure, those costs should be assessed as claimed at detailed assessment, unless the paying party could show a good reason to depart from the budgeted figures. The Respondent contended that as the paying party it was entitled to a full detailed assessment, with the cost budget being just one of the factors in determining whether the costs were reasonable and proportionate.

The decision of DJ Lumb

In October of last year DJ Lumb, sitting as a Regional Costs Judge, held that on detailed assessment the courts powers were unfettered by the existence of the cost budget, (with the proviso that the receiving party could not recover in excess of the budgeted figure unless it could show a good reason). The paying party was thus at liberty to challenge the receiving party's bill on a line for line basis in the conventional manner.

The decision on appeal

On appeal Carr J set out in quite neutral terms the contradiction inherent in the first instant decision: "*Thus the Respondent's position was (and remains) that a paying party does not need good reason to persuade a court to depart from an approved or agreed budget downwards, but a receiving party needs a good reason to persuade a court to depart from an approved or agreed budget upwards",* (paragraph 4).

Carr J noted that the Costs Judge had not yet considered the budget or the bill and that the appeal before her related to the determination of a preliminary issue formulated by the Costs Judge in these terms: "*To what extent, if at all, does the costs budgeting regime under CPR Part 3 fetter the powers and discretion of the costs judge at a detailed assessment of costs under CPR Part 47?"*

Having considered in some considerable detail the reasoning behind the decision of DJ Lumb and having considered a number of other cases where this issue had arisen, the learned judge offered this view in paragraph 92 of her judgment:

> *"In my judgment, the answer to the preliminary issue is as follows: where a costs management order has been made, when assessing costs on the standard basis, the costs judge will not depart from the receiving party's last approved or agreed budget unless satisfied that there is good reason to do so. This applies as much where the receiving party claims a sum equal to or less than the sums budgeted as where the receiving party seeks to recover more than the sums budgeted".*

Carr J arrived at this decision on the basis of her understanding of the plain language contained within rule 3.18 and having considered the policy considerations underpinning cost management.

CPR 3.18

CPR 3.18, as the learned judge noted, was central to the dispute between the receiving and paying party. CPR 3.18 provides as follows:

> *"Assessing costs on the standard basis where a costs management order has been made*
>
> *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 budget for each phase of the proceedings; and*
>
> *(b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so.*
>
> *(Attention is drawn to rules 44.3(2) (a) and 44.3(5), which concern proportionality of costs.)*

Carr J held that the clear words contained within CPR 3.18 served to bind the parties at a detailed assessment to the budgeted figures unless there was good reason to find otherwise. In paragraph 67 Carr J put it in these terms:

> *"The words are clear. The court will not – the words are mandatory - depart from the budget, absent good reason. On a detailed assessment on a standard basis, the costs judge is bound by the agreed or approved costs budget, unless there is good reason to depart from it. No distinction is made between the situation where it is claimed that budgeted figures are or are not to be exceeded. It is not possible to square the words of CPR 3.18 with the suggestion that the assessing costs judge may nevertheless depart from the budget without good reason and carry out a line by line assessment, merely using the budget as a guide or factor to be taken into account in the subsequent detailed assessment exercise".*

Carr J concluded that the approach that she had adopted reflected the fact that the costs budgeting process involved the court in determining issues of reasonableness and proportionality. In paragraph 68 of her judgment the learned judge said this:

> *"This straightforward conclusion reflects the fact that costs budgeting involves the determination of reasonableness and proportionality (see paragraph 7.3 of Practice Direction 3E and paragraph 3 of the Guidance Notes to Precedent H). It is important to remember at the outset (and also in the context of the debate as to the meaning of the word "budget" addressed below) precisely what a judge is doing at the cost budgeting stage. He/she is not identifying what is the maximum amount by way of future costs considered to be reasonable and proportionate. He/she is identifying what future costs are reasonable and proportionate".*

Policy reasons

Carr J also concluded that there were sound policy reasons for not permitting the party's to depart from the budgeted figures absent a good reason for doing so. Carr J observed that "*the obvious intention of CPR 3.18 was to reduce the scope of and need for detailed assessment. The Respondent's approach would defeat that object",* (paragraph 67).

The learned judge rejected the argument that the cost budget was no more than a guide at detailed assessment for these reasons:

> *"It is fair to ask the question that, if it be right that an agreed or approved costs budget is no more than a guide at detailed assessment, even if a strong one, what point there can be in the parties and the court spending so much time on the cost budgeting exercise. The Respondent counters that it will still have value in that it can be a strong guide and so be likely to deter some detailed assessments altogether. But it is still difficult to see why so much time and money would be invested at the costs management stage if the budget were to be no more than a guide in any case where there is an underspend",* (paragraph 72).
>
> As Carr J was at pains to point out if a receiving party has spent less than was agreed or approved in the budget the need to comply with the indemnity principle would constitute a "good reason "for the purposes of CPR 3.18. There was thus "*no question of a party receiving more by way of costs than was actually spent", (*paragraph 74).

Conclusion

It is clear that the decision in *Merrix* will not be the final word on this issue. In May the Court of Appeal is due to hear the case of *Harrison v Coventry NHS Trust,* August 2016 (unreported). In *Harrison* Master Whalan came to the same view as Carr J and held that the wording of CPR 3.18 (b) was conclusive and that there should be no line by line assessment of the bill absent good reason. In *Merrix* Carr J indicated that any appeal from her decision could perhaps be listed alongside that of the appeal in *Harrison*. As things stand it seems likely that many cases ready for detailed assessment will be stayed pending a more definitive view from the Court of Appeal.

Does Late Acceptance of a P36 Offer Result in an Indemnity Costs Order?

By James Plant

This issue has been a hot topic of late and one that has been keenly fought by both Claimant and Defendant PI firms (in just one week recently I was instructed in 2 hearings on either side of the argument).

It is of particular relevance in fixed cost PI matters where Defendants accept offers late as a) CPR36.20 does not set out the consequences when Defendants accept Claimant's offers late (whereas CPR36.20(4) does so for late-accepting Claimants and b) there are clear incentives for Claimants to secure indemnity costs from the date of expiry of an offer in light of the Court of Appeal's decision in *Broadhurst v Tan* [2016] EWCA Civ 94 (the dicta of which is now well known but was helpfully summarised in our last newsletter by Aidan O'Brien).

A case frequently deployed by Claimants running this argument is *Sutherland v Khan* (Unreported) available on Lawtel. It is a decision made by District Judge Besford in Kingston upon Hull who sits as a Regional Costs Judge. In that case (a low value RTA) the claim exited the portal and the Claimant made a valid Part 36 offer after filing her Pre-Trial Checklist. The Defendant accepted this offer approximately a month after the relevant period for acceptance.

The learned judge gave an extempore judgment on the day of the hearing finding:

a) The application was made pursuant to Part 36 (being a self-contained code) and not CPR45.29J (exceptional circumstances warranting costs exceeding fixed costs);

b) No specific assistance could be divined from Part 36 in respect of the consequences for Defendants accepting offers late in fixed costs cases however it states the following in respect of late accepting Claimants in CPR36.20(4):

(4) Subject to paragraphs (5), (6) and (7), where a defendant's Part 36 offer is accepted after the relevant period—

(a) the claimant will be entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which the relevant period expired; and

(b) the claimant will be liable for the defendant's costs for the period from the date of expiry of the relevant period to the date of acceptance.

c) The starting point for considering the liability for costs is therefore CPR36.13(5):
(5) Where paragraph (4)(b) applies but the parties cannot agree the liability for costs, the court must, unless it considers it unjust to do so, order that—

(a) the claimant be awarded costs up to the date on which the relevant period expired; and

(b) the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.

d) This is furthered by CPR36.13(6) which states that:

(6) In considering whether it would be unjust to make the orders specified in paragraph (5), the court must take into account all the circumstances of the case including the matters listed in rule 36.17(5).

Following on from this CPR36.17(5) states:

(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—

(a) the terms of any Part 36 offer;

(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;

(c) the information available to the parties at the time when the Part 36 offer was made;

(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and

(e) whether the offer was a genuine attempt to settle the proceedings.

Finally CPR36.17(4) states:

(4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—

(a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

(b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;

(c) interest on those costs at a rate not exceeding 10% above base rate; and

(d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—

(i) the sum awarded to the claimant by the court; or

(ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs-

Amount awarded by the court	*Prescribed percentage*
Up to £500,000	*10% of the amount awarded*
Above £500,000	*10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure.*

The learned judge's ultimate interpretation of this series of rules is that all the circumstances must be considered including CPR36.17(5). CPR36.17(5) begins with the premise that the benefits under CPR36.17(4) should "only be denied if it be unjust". Therefore "to deny the consequences that flow from accepting a part 36 out of time the court has to make pretty exceptional findings and there has to be some very good reason as to why it is unjust not to make the usual order… I find that the usual consequences of part 36 should flow".

e) He also turned to the case of *Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions (UK) Ltd (formerly Wormald Ansul (UK) Ltd)* [2009] EWHC 274 (TCC). In Fitzpatrick Coulson J found (please note that this considered an earlier drafting of Part 36 with different wording / numbering although the principles are the same) inter alia that:

19. First, I am bound to note that there is no reference at all within CPR 36.10(4) and (5) to a presumption that, unless it is unjust to do so, the court will order a late-accepting defendant to pay the claimant's costs on an indemnity basis. The absence of such a provision is important. The usual basis for the assessment of costs is the standard basis; if there is an entitlement to seek indemnity costs, then it is expressly spelled out in the CPR, either as a rebuttable presumption (such as the presumption in r36.14) or by way of conduct (r44.3). There is no rebuttable presumption expressed here.

20. Although it is always dangerous to speculate how and why the rules say what they do, it seems to me that there is a relatively straight forward explanation for why this part of the CPR is in its present form. A claimant's entitlement to indemnity costs when it beats its own offer after a trial was first enshrined in the old r36.21 and was plainly designed to deal with the situation where a trial had taken place and costs had been wasted because the defendant should have accepted the Part 36 offer. For the reasons explained by Lord Woolf in Excelsior, this was more advantageous than the defendant's position under r36.20. On the words of the old r36.21 the situation argued for here could not have arisen, because r36.21 applied only where the defendant was held liable "for more" than the amount of the offer. Following the decision in *Read v Edmed* the rule was changed so that it expressly covered the situation where, after a trial, the claimant recovered the same as the amount of its unaccepted offer. But there is nothing on the face of any

of the existing rules to suggest that this change was also designed to reward a claimant (whose offer under CPR 36.10 was accepted out of time and before there was any trial) with a rebuttable presumption in its favour in respect of indemnity costs.

21. Secondly, I consider that the court has to be very careful before inserting into a rule, which is silent on costs, a presumption of this kind, extracted from a different rule altogether. It seems to me that, on this point, Lord Woolf's remarks in Excelsior are of some relevance (although I acknowledge that he was dealing there with a contrast between the old r36.21 and the old r36.20.) He concluded that, in the absence of any reference to the indemnity basis, an order for costs which the court was required to make under the old r36.20 was an order for costs on the standard basis. It seems to me that precisely the same general reasoning would apply here to CPR 36.10(4) and (5).

22. I accept Mr Thomas's submission that the other cases relied on by Fitzpatrick, namely Petrotrade, Huck and Read do not offer very much assistance to the central question here, which is whether a rebuttable presumption in favour of indemnity costs, taken from a rule dealing with the situation following a trial where the offer has not been accepted, should be inferred into a rule dealing with the position prior to trial, where the offer has been accepted. I do not accept that the present situation is analogous to those cases. In all three of them, the

courts were endeavouring to apply the words of the old r36.21 in a common sense way, to achieve a just and sensible result, and to prevent injustice; they all arose after a trial on the merits (either on a summary or a full basis). In contrast, I conclude that the replacement of old r36.21 - the new CPR 36.14 - does not apply to the present case, because there has been a settlement, and it has occurred before the trial. The claimant has therefore been spared the costs, disruption and stress of the trial.

23. Thirdly, I note that r36.10(3), which deals with the situation where the claimant's offer is accepted within the relevant period, expressly provides that costs will be assessed on the standard basis. If, therefore, there was a presumption that indemnity costs would apply under r36.10(5), when an offer was accepted outside the period, it seems to me that the rule would say so. It does not, and, in my judgment, that is not an oversight or an omission; it is because either standard or indemnity costs may be applicable where an offer is accepted after the relevant period, depending on the analysis under CPR 44.3.

24. Finally, I am not persuaded that, as a matter of policy, it would be appropriate to import an indemnity costs presumption into r36.10(4) and (5). A defendant is entitled to accept an offer beyond the period of acceptance. In a complex case such as this, a defendant should be encouraged continuously to evaluate and re-evaluate the claim and its

own response to that claim, so that even if the defendant had originally concluded that it was not going to accept the offer, it should always be prepared to change its mind. The CPR should be interpreted in a way that encourages such constant re-evaluation.

25. All those of us involved in civil litigation are conscious of the irony that a well-judged Part 36 offer by one party (whether claimant or defendant) at the outset of proceedings can often make a trial and a fight to the finish more, rather than less, likely, because there will often be instances where, by the time the offeree has belatedly realised that the offer was well-judged, he will have incurred considerable cost, and may feel that he has no option but to go on and fight the case through to the finish in the hope of bettering the offer. Such an outcome is not to be encouraged. There is a risk that, if a defendant belatedly changed its mind as to the acceptability of a claimant's Part 36 offer, the defendant would be discouraged from formally accepting that offer if it thought that it would have to pay indemnity costs in consequence. It would not be appropriate to construe the CPR in such a way, because that would, in my view, actively discourage late settlements and instead give rise to another reason for the offeree to push on to a trial.

26. I do not accept that a claimant is "induced" into making an offer pursuant to CPR 36 simply because of the prospect that, if it was successful at trial, it would get indemnity costs. That is simply one

possible incentive, and should not be over-emphasised. Nor do I consider that it would be a disincentive to a claimant in the position of Fitzpatrick to make any such offer at all, if it thought that the offer would be accepted out of time in circumstances where it would not recover indemnity costs. A claimant makes a Part 36 offer for a whole variety of reasons, not least in the hope of forcing the defendant to an early settlement. By so doing, the claimant also buys itself costs protection for the future, whether that costs protection is measured by either the standard or the indemnity basis. In addition, a claimant with a large claim, where parts of it may be uncertain, is well advised to make a Part 36 offer in any event because, even if the claimant does not beat the offer, if its actual recovery comes closer to the amount of its own offer than to the amount of any offer made by the defendant, the claimant will still be in a strong position to recover all its costs following the trial.

27. Accordingly, for policy reasons, it seems to me that it would be wrong to presume an entitlement on the part of a claimant to indemnity costs in these circumstances. Such a presumption would, I think, hinder rather than promote early settlements, for the reasons that I have sketched out above.

28. Furthermore, it is not as if the claimant is deprived of the remedy of indemnity costs altogether. The parties have rightly agreed that, in this case, the claimant is entitled to seek indemnity costs in the

conventional way, by reference to conduct, and matters of that sort, pursuant to CPR 44.3. That is a further reason of policy why I would conclude that an indemnity costs presumption should not be imported into CPR 36.10: there is already a right to claim recovery of indemnity costs; what there is not, in my view, is a rebuttable presumption that such costs will be recovered.

f) The learned judge's view was that "perhaps" *Fitzpatrick* stated the law as it was in 2009 but not as it stood now. There is now a greater "carrot and stick" effect in respect of Part 36 offers – if there is no incentive/penalty there would be little point in Defendants accepting offers early i.e. in time;

g) Further still, it would be unsatisfactory (in terms of the overriding objective) if penalties flow from beating an offer at trial but not from settling before trial;

h) The court need not therefore make an adverse finding in respect of conduct before ordering indemnity costs.

With no disrespect to the court intended I disagree with numerous aspects of the reasoning in this judgment:

a) The rules do not suggest that there is a presumption for an award of costs assessed on the indemnity basis. The note in the White Book

under CPR36.13 states "there is no presumption that the court would order a late-accepting party to pay the other party's costs on an indemnity basis. The usual basis will be the standard basis unless (say) conduct is in issue, in which event r.44.2 will apply". It then cites *Fitzpatrick;*

b) *Fitzpatrick* (which must be presumed to be good law) is binding on the County Court;

c) To my reading CPR36.13(6) does not incorporate all of CPR36.17(5) but specifically refers to the "matters listed" in the rule i.e. the sub-paragraphs listed at a) to e). I accept that the drafting is not perfect but the intention is tolerably clear and thereby excludes a further link to CPR36.17(4);

d) In any event CPR36.17(5) is engaged only to determine whether it would be unjust to make an order under CPR36.13(5) i.e. addressing who pays what costs and for what period. If CPR36.17(4) were intended to be considered in the making of this decision it would be nonsensical;

e) Greater injustice may result if there were the same consequences for late acceptance as for an offer being beaten at trial i.e. faced with similar costs a party might be minded to fight a case it would otherwise settle;

f) There is a sanction for late acceptance (albeit not a particularly stringent one) which is the principle of paying costs from the expiry of the offer to the acceptance;

g) It is notable that in CPR36.20(12) costs awarded to a Defendant for late accepted offers are limited to fixed costs not costs assessed on the indemnity basis.

I understand (from various costs legal blogs) that the Defendant obtained permission to appeal the decision in *Sutherland* but did not pursue it.

In *Whiting v Carillionamey* (Housing Prime) Limited (unreported but mentioned on Andrew Hogan's blog **www.costsbarrister.co.uk** - he was counsel for the Defendant) the issue was fought once more in the County Court. It was a similar matter to Sutherland as there was late acceptance of a valid Part 36 offer by a Defendant with no conduct issues (however it was not a fixed costs case). At first instance DDJ Haig-Haddow awarded the Claimant costs assessed on the standard basis until the expiry of the offer then indemnity costs thereafter.

The Defendant appealed to HHJ Hughes QC who allowed the appeal.

While there is no transcript of the judgment it is reported (again by Andrew Hogan) that HHJ Hughes QC accepted that he was bound by *Fitzpatrick* and the fundamental principle in *Excelsior Industrial and Commercial Holdings v Salisbury Hammer Aspden and Johnson* [2002] EWCA Civ 879 where Lord Woolf set out at paragraph 19:

> *The clear inference from the absence of any reference to an indemnity basis in 36.20 is that, in normal circumstances, an order for costs which the court is required under that Part to make, unless it considers it unjust to do so, is an order*

> *for costs on the standard basis. That means that if the court is going to make an order for indemnity costs, as it can in a case where Part 36.20 applies, it should do so on the assumption that there must be some circumstance which justifies such an order being made. If I may here adopt the way it was put in argument by Waller LJ, there must be some conduct or (I add) some circumstance which takes the case out of the norm. Mr Davidson's argument on this part of the appeal is that there was here not found by the judge any such circumstance.*

Where does this leave parties?

Criticism of the drafting of Part 36 in respect of this issue (and others) is not unwarranted and perhaps the Rules Committee will see fit to alter or refine it at same stage. For my part, notwithstanding the reasoning in *Broadhurst*, I do not think that on the current wording of the Rules the Court of Appeal is likely to find that indemnity costs should be paid where conduct is not in issue.

In the meantime parties seeking indemnity costs for late acceptance should concentrate their efforts on cases where conduct is in issue pursuant to CPR44.2 (indeed this approach was successful in one of the aforementioned 2 cases).

Further there is an opportunity (or threat depending on your perspective) presented by the failure to pay within 14 days (or other agreed time) of acceptance under CPR36.14(7). The Claimant may enter judgment thereby bringing in the relevant consequences under CPR 36.17.

Case Law Round-Up

By Robert Golin

***Sharp v Leeds City Council* [2017] EWCA Civ 33**

(Jackson LJ, Briggs LJ, Irwin LJ)

Significance: The fixed costs regime applicable to the Pre-action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims applied to the costs of a claimant's pre-action disclosure application even where the claim was no longer continuing under the Protocol when the application was made.

Facts: The court was required to determine on a second appeal whether, in proceedings which started under the Pre-action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims but which were subsequently pursued under the Personal Injury Protocol, the fixed costs regime applicable to the pre-action protocol applied to the costs of an application for pre-action disclosure. At first instance the district judge allowed £1,250. On a first appeal the judge reduced the costs to £300 on the basis that the fixed costs regime applied. The claimant appealed.

Held: Appeal dismissed. The fixed costs regime applied to the costs of an application for pre-action disclosure. The regime was subject to a very small number of clear exceptions. To recognise other, implied, exceptions would be destructive of the regime's clear purpose. The wording of CPR 45.29A and 45.29D supported that conclusion. The latter rule provided that fixed costs and disbursements were "the

only costs allowed". Further, CPR 45.29E and Table 6C Part A made it clear that the fixed costs regime applied to cases which started under the EL/PL protocol even though such cases might never result in court proceedings being issued. It was entirely apposite for a pre-action disclosure application to fall within the description of an "interim application" in CPR 45.29H.

***Rezek-Clarke v Moorfields Eye Hospital NHS Foundation Trust* [2017] EWHC B5 (Costs)**

(Master Simons)

Significance: The Senior Courts Costs Office rejected a challenge to its provisional assessment of a claimant's costs in a low-value clinical negligence case. Costs of £72,320 were disproportionate given that the claim was worth less than £5,000 and had settled for £3,250 shortly after issue.

Facts: At an oral hearing held under CPR 47.15(7), the claimant ("R") challenged a provisional assessment of his costs. The parties had settled the claim for £3,250 and the trust had been ordered to pay the R's costs on the standard basis. R's solicitors served a bill of costs in the sum of £72,320. The court found the bill to be disproportionate and, on provisional assessment, reduced it to £24,604. In doing so, it reduced a block-rated ATE insurance premium from £31,976 to £2,120.

Held: Despite the low value of the claim, there was no evidence that R's solicitors had planned the work to be done or considered the costs to be incurred with an eye

on proportionality (*Jefferson v National Freight Carriers Plc* [2001] EWCA Civ 2082 followed). While it was necessary to incur costs when investigating whether a claim had prospects, those costs had to be proportionate if they were to be recoverable from the paying party. Costs of £72,320 for a medical negligence claim worth less than £5,000 were disproportionate. After April 2013 it was no longer necessary for the court to look separately at profit costs and additional liabilities. CPR 44.3(2) made no distinction between profit costs, disbursements or additional liabilities, and any item in a bill of costs could be disallowed or reduced on the ground that it was disproportionate, even if it had been reasonably or necessarily incurred (*Rogers v Merthyr Tydfil CBC* [2006] EWCA Civ 1134 distinguished). As to the ATE premium, there did not appear to have been any consideration of whether the particular policy, which entailed the payment of an expensive premium, was appropriate in such a low value case. While the court might justifiably disallow the premium in its entirety, it would allow £2,120. That sum represented a reasonable and proportionate premium inclusive of insurance premium tax.

***Campbell v Campbell* [2016] EWHC 2237 (Ch)**

(Chief Master Marsh)

Significance: The court has jurisdiction: (a) to order a litigant in person to file a costs budget; and (b) to make a costs management order in relation to litigant in person.

Facts: The claimant, a litigant in person, instructed a barrister on a direct access basis and wished to obtain additional legal assistance that fell short of formally

instructing solicitors to conduct the case. His costs were likely to be substantial. Both parties asked the court to make a costs management order in respect of the claimant's costs.

Held: CPR 3.13(2) expressly exempts litigants in person from filing costs budgets and budget discussion reports. However, CPR 3.15(2) provides that the court can manage the costs to be incurred "by any party" and no indication is given that different provisions apply to litigants in person. Further, PD 3E para.2(a) provides that where parties are not required by the CPR to file and serve costs budgets, the court has a discretion to order them to do so. Thus, while the default provisions for the service of budgets excluded litigants in person, a litigant could choose to file and serve a budget, or the court could order a litigant to do so and make a costs management order.

Merrix v Heart of England NHS Foundation Trust **[2017] EWHC 346 (QB)**

(Carr J)

Significance: As to the interplay between the costs budgeting regime in CPR Part 3, and the detailed costs assessment regime in CPR Part 47, where a case settled before trial and a costs management order had been made, a costs judge would not depart from the receiving party's approved costs budget unless satisfied that there was good reason to do so. That applied equally whether the receiving party claimed less, the same as, or more than the sums budgeted.

Facts: M's case settled before trial and her bill of costs was less than the sum of her approved budget. M's argument was that, in such circumstances, the receiving party's costs should be assessed as claimed unless the paying party established a good reason to depart from the budgeted figure. H's argument was that, upon settlement of a case, there should be a full assessment of costs, with the costs budget being just one of several factors influencing the determination of a reasonable and proportionate sum. The judge at first instance held that costs budgeting did not replace detailed assessment and did not fetter a costs judge's discretion when performing a detailed assessment.

Held: M's appeal was allowed. Where a costs management order had been made, a costs judge assessing costs on the standard basis would not depart from the receiving party's last approved or agreed budget unless satisfied that there was good reason to do so. The central message, set out in CPR 3.18, was that an approved budget would bind the parties at detailed assessment unless there was a good reason to find otherwise. If the receiving party spent less than was approved in the budget, the need to comply with the indemnity principle would require departure from the budget, so there was no question of a party receiving more in costs than had actually been spent. The fact that r.44.4(3)(h) stated that the receiving party's last approved or agreed budget was a factor to which the court should have regard did not demote the budget to the status of a guide alone. Fidelity to the wording of r.3.18 would achieve the dual purpose of reducing the costs of detailed assessment and securing greater predictability in terms of costs exposure and recovery.

***Elkamet Kunststofftechnik GmbH v Saint-Gobain Glass France SA* [2016] EWHC 3421 (Pat)**

(Arnold J)

Significance: As the court had the power to make an order for damages or costs in a foreign currency, it followed that the court ought to have the power, if it decided to make an order in sterling, to compensate for any exchange rate loss.

Facts: The court summarily assessed E's costs following a decision in its favour in patent proceedings. An issue arose from the decline in the exchange rate between the pound and the euro since proceedings had begun, and in particular since the EU referendum on 23 June 2016. The first invoice paid by E to its solicitors was at a time when the exchange rate was £1 to €1.39, whereas the most recent invoice had been paid at an exchange rate of £1 to €1.14. That was a substantial move in the exchange rate which was adverse to the claimant given that it had to exchange euros into pounds in order to pay its solicitors' bills. The claimant sought an order which compensated it for the losses that it had suffered as a result of the movement in the exchange rate, because the costs order that would be made would be expressed in sterling.

Held: The court had the power to make an order for damages or costs expressed in a foreign currency (*Miliangos v George Frank (Textiles) Ltd* [1976] A.C. 443 considered). It seemed to follow as a matter of logic that the court ought to have the power, if it decided to make an order in sterling, to compensate for any exchange rate loss. If the receiving party was a foreign company which had had to exchange its local

currency into sterling in order to pay costs as the litigation proceeded, it seemed that the successful party was entitled to be compensated for any additional expenditure it had incurred as a result of exchange rate losses. The court ordered an additional payment of £20,000 to reflect the currency loss.

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