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Costs.

Where are we now?

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CONDITIONAL FEE AGREEMENTS

(a) Success Fees

1. The Defendant insurer's nightmare:
   - Additional cost
   - Level not known until the end of the claim
   - No predictability in relation to individual cases or classes of cases.

2. The position is improving due to four factors:
   - Increasing use of fixed / predictive costs
   - Agreements being made relating to classes of cases
   - Some increased use of 'two stage' success fees
   - Additional guidance from courts

3. In addition, significant changes in relation to CFA's in general are afoot.

<u>Fixed / Predictive Costs</u>

3. Outside the scope of this talk, but obvious that Rules of Court which fix success fees or provide a clear framework for their calculation have significant benefits:
   - Certainty and predictability
   - A reduction is 'costs of the costs' – fewer arguments on assessments
   - A knock on effect on technical challenges. If a fair system has been agreed or imposed, paying parties are less likely to resort to technical challenges to avoid what are seen as unreasonable costs.

4. Present application:

- Road Traffic Accidents after 6th October 2003 (including cases where proceedings have been issued). Success fee fixed at 100% if there is a trial or 12.5% otherwise (CPR 45.16). Note – if it settles without proceedings for less than £10,000 the solicitor's profit costs are also fixed.
- Employers Liability Claims (non disease) after 1st October 2004 (including cases where proceedings have been issued). Success fee fixed at 25% or 100% if there is a trial (CPR 45.20).

5. Clearly a large part of the future. It is anticipated that efforts will be made in relation to Clinical Negligence Claims and other classes of case in the near future.

6. **Nizami v Butt** (unreported, Master O'Hare, 30th June 2005). Does the indemnity principle apply to solicitors' profit costs in fixed costs cases under CPR part 45? In other words – does it matter any more if the client's liability to the solicitor is less than what is being sought form the paying party (or even if there is no liability on the client)? Apparently not. This case is under appeal.

Agreements re classes of cases

- For example the Montague Hotel Agreement (employers liability claims) which was the basis for the introduction of fixed costs.
- July 2005 agreement on Employers Liability disease claims – to be implemented in the CPR in October 2005. Incorporates different success fees for different disease types.

7. There is nothing to prevent the development of local agreements, or agreements between firms of groups of solicitors and insurance firms. If made, the court is unlikely to be involved, but even if it was is likely to

be very supportive of the use of such agreements (if only because it saves the court from having to deal with the arguments).

Two stage success fees

8. Advocated by the Court of Appeal in **Callery v Gray** [2001] EWCA Civ 1117, but much misunderstood. They allow solicitors to agree a low success fee in the event that cases settle early, with the guarantee of a high one if they 'fight'. The success fee, whichever it is, applies throughout the whole claim – there is only ever one success fee.

9. If properly used, they bring a degree of stability and predictability. Not least, they become less dependent on the facts of any given case and more on the response from the Defendant. Therefore, unlike an ordinary case, a Claimant has nothing to lose by telling the Defendant at the outset that the success fee is x% if the case settles before issue (or some other date) and y% if not. Although some Defendants see this as blackmail, if the figures are reasonable and if the practice is widely adopted, the Defendant is able to budget far more accurately and is aware at an early stage of what is at risk.

10. Whilst the importance of two stage success fees may be diluted by some of the other matters discussed, they are gradually becoming more widely used and are clearly being encouraged by the Court of Appeal. They should not be overlooked.

Recent judicial guidance on success fees

11. Two important cases on the subject were heard by the Court of Appeal over the last year. In **Atack v Lee; Ellerton v Harris** [2004] EWCA Civ 1712, the Court held:

(1) In Atack that, in relation to an RTA case involving a roundabout issue which went all the way to trial on liability (and quantum), a 100% success fee was not justified because, on proper analysis, at the time the CFA was entered into the prospects of success were better than 50-50; The 50% success fee allowed below was upheld, though the court considered anything up to 67% success fee would have been reasonable;

(2) In Ellerton, a case involving reversing a car in a car park and knocking down an elderly pedestrian, the guidance given by the Court in **Callery v Gray (No.1)** [2001] EWCA Civ 1117; [2001] 1 WLR 2112 was appropriate and the 20% success fee allowed there was applied.

12. Some relatively certain principles can be drawn from these judgments:

(1) The vital issue on the setting of an appropriate success fee is what it was always intended to be – the risk of losing that case as it reasonably appeared at the time the agreement was signed – see paragraphs 8 (cf Lord Scott in Callery [2002] 1 WLR 2000) and 37;
(2) General evidence of the prospects of success in certain types of cases – if available and reliable – may be helpful both to the solicitor at the time and the court on assessment – see paragraph 12.
(3) The new fixed fee agreement rules cannot be retrospectively applied;

(4) Solicitors should properly consider the facts of the case – a generic matrix applying seemingly random percentages to factors is unlikely to be of much help – see paragraph 37.

(5) A denial of liability (even in strenuous terms) does not guarantee a 100% uplift. There should still be a proper consideration of the merits of the case. (paragraph 38).

(6) Whether a case when to trial is strictly irrelevant – hindsight cannot be used (though it may leave a paying party with an uphill struggle to say the case was an obvious 'winner');

(7) If there is a simple enquiry which can be carried out before the CFA is signed to see if liability is genuinely an issue, then that should be done: paragraph 49.

(8) Two stage success fees are to be encouraged.

13. **KU v Liverpool City Council** [2005] EWCA Civ 475 was a tripping case in which a 4a district judge held that the success fee should be reduced from 100% to 5% for the period after liability had been admitted.

14. The Court of Appeal decided:

(1) That 100% had always been to high a success fee and an appropriate figure was 50% (see paragraph 54);

(2) If a solicitor agrees a single stage success fee with the client, the court has no power to impose a two stage one. It is the solicitor and the client's choice. The court's power is limited to deciding if the figure is reasonable.

(3) The District Judge, like many others, had misunderstood what the Court of Appeal had said in Callery.

(4) Parties were again encouraged to use two stage success fees – the Court indicated that a high success fee in such a case would be much easier to justify than in a single stage case (paragraph 57).

15. It is clear that the Court of Appeal is keen to limit challenges in costs cases and appear to realise that to do so it must curb claims for excessive costs – in particular success fees. Shortly after KU, the Court of Appeal had, for the first time, to assess a success fee in a case before them (**Begum v Klarit** [2005] EWCA Civ 210). Brooke LJ's criticism of the high success fee claimed was trenchant and he described it as discrediting and devaluing the entire CFA system.

16. The new CFA system will not remove the need for courts to assess success fees. This is likely to remain one of the significant areas of dispute. The developments of a fixed structure in relation to certain types of case and of inter partes agreements is to be encouraged, but there is a significant way still to go.

(c) Technical Challenges and Breaches of the CFA Regulations

17. For several years this has been one of the significant features of costs litigation. Paying parties say they have been left with little choice but to take such challenges because of the unreasonable increase in costs. Receiving parties say they are being plagued with unmeritorious attempts to deprive them of costs in cases they have won. The courts have been caught in the middle.

The future

18. The Conditional Fee Agreement (Revocation) Regulations 2005. These will come into force on the 1st November for agreements made after that date. After a lengthy consultation process about amendment of the Regulations, the decision has been ever more simple – remove the Regulations altogether.

19. Only very limited legislative requirements remain – s. 58 Courts and Legal Services Act 1990. The only statutory requirements will be that the agreement be in writing, it does not apply to criminal or family proceedings and that the success fee must be stated and cannot be more than 100%. There will be no requirement that it even be signed, let alone that it have all the "consumer protection" requirements in the current Regulations. The indemnity principle, however, has not been abolished (though it is under attack).

20. Some query whether this allows US-style contingency fees? On this subject, see comments by the Privy Council (including Lords Hope, Hutton and Scott) in **Kellar v Williams** (Privy Council Appeal no. 13 of 2003, 24th June 2004 at paragraph 21, echoing the views of Millett LJ in **Thai Trading v Taylor** [1998] QB 781).

21. The emphasis in the future will be on solicitors' compliance with their rules of professional conduct (in particular the Solicitors Practice Rules and the Solicitors Costs Information and Client Care Code).

22. The aim is to prevent technical challenges and to simplify the system. In particular, the intention is to amend the professional rules to make breaches a matter of professional conduct - taking the paying party out of the loop.

23. In practice – a substantial number of challenges are likely to continue, both in relation to agreements generally and in relation to the relationship between rules of professional conduct, Conditional Fee Agreements and the indemnity principle. Practice Rule 15 requires compliance with the Solicitors' Costs Information and Client Care Code, and the Practice Rules themselves are delegated legislation (see **Swain v The Law Society** [1983] 1 AC 598 (HL) **Awwad v Geraghty** [2001] QB 370 (CA)).

The Present Position

24. Due to the amount of successful technical challenges to recovery of costs on the basis of minor breaches of Section 58 and/or the CFA Regulations 2000, which resulted in a total disallowance of costs, the Court of Appeal eventually had to make up some new law to ensure the whole scheme was viable in the conjoined appeals **Hollins v Russell** [2003] 1 WLR 2487 where they held that the question of whether the requirements were "satisfied" introduced a test of materiality of breach (paragraph 107):

> *"Has the particular departure from a Regulation pursuant to Section 58(3)(c) of the 1990 Act or a requirement in Section 58, either on its own or in conjunction with any other such departure in the case, had a materially adverse effect either upon the protection afforded to the client or upon the proper administration of justice?"*

The types of challenges

25. Failing to check adequately whether the client already has insurance which will indemnify him for legal costs (BTE).

26. This requirement is imposed by Regulation 4(2)(c) of the CFA Regulations 2000 and requires the solicitor to advise his client:

"*whether the legal representative considers that the client's risk of incurring liability for costs in respect of the proceedings to which the agreement relates is insured against under an existing contract of insurance*."

27. The Court of Appeal held in **Sarwar v Alam** [2002] 1 WLR 125 (CA) that it was not good enough for a solicitor simply to ask the client whether he had any available existing insurance as clients would often not know. Therefore, it was necessary to ask the client to bring in any relevant motor insurance policy, household insurance policy, any standalone BTE policy belonging to the client or partner living with him/her.

28. This case is interesting, because it related to a case which was not a CFA case. The simple question was whether the cost of an After the Event (ATE) insurance policy was reasonable when BTE insurance was available.

29. Over the last two years, the issue has been in the spotlight. In **Culshaw v Goodliffe**, HHJ Stewart QC (unreported, Liverpool CC, 24th November 2003) the solicitor simply got it wrong. The client told him he had no ATE insurance and the solicitor took him at his word. The client did have an appropriate policy. The judge had no difficulty in finding the agreement was unenforceable. A similar decision was reached in **Adair v Cullen** (unreported, HHJ Holman on 14th June 2004).

30. This have become worse for Claimant solicitors. In **Samonini v London General Transport Services Ltd** [2005] EWHC 90001 (Costs) Senior Costs Judge Hurst found that a solicitor relied solely on the fact that an unqualified employee of a claims handling company had asked the client if she had LEI and he said not. The judge held

that the agreement was unenforceable – the successful solicitor went unpaid. This was despite the fact that it was agreed that, if checks had been made, the Claimant did not have any BTE insurance.

31. A similar conclusion was reached recently in the case of **Myatt v National Coal Board** (unreported, Master Wright 12th August 2005). Once again, despite the fact that there was no evidence that any of the four Claimants had BTE insurance (and they were unlikely to have it), the enquiries were not sufficient and the solicitor went unpaid. This case has implications for a large number of cases with the same firm and an appeal is likely.

32. Are such challenges going to disappear? Probably not. Paying parties can still argue that it was unreasonable to incur the extra costs of ATE insurance and a success fee without making proper checks for BTE insurance – see Sarwar. They are supported by Paragraph 4(j) of the Costs Information and Client Care Code. The main difference may be that the solicitor still receives his base costs but the success fee and insurance premium are lost.

Solicitors with an interest?

33. This is an area which has long been overlooked but recently has gained prominence, particular as the insurance market for ATE policies has become more sophisticated. In particular, it is not unknown for the partners of firms of solicitors to 'own' the insurer which, nominally at least, is providing the ATE insurance.

34. Under Regulation 4(2)(e) a solicitor recommending an insurance contract must inform his client whether he has an interest in doing so. It has recently been held that failure to do so is a material breach,

rendering the CFA unenforceable. The case is understood to be under appeal and hopefully will provide an interesting appellate judgment on this topic.

35. Once again, this is an argument which is likely to be resurrected even after the Regulations are abolished by way of arguments as to solicitors' conduct and the reasonableness of their behaviour.

(2) ATE INSURANCE PREMIUMS

36. The introduction of recoverable After the Event Insurance Premiums (s. 29 Access to Justice Act 1999) has placed costs and district judges in an unenviable position. They are the only safeguard on the reasonableness of these premiums. Accordingly, they have been put in the position of assessing, without any real evidence, what sum it is reasonable for a client to pay for insurance.

37. Certain parameters were established at a fairly early stage. To be recoverable from a paying party, the premium must be genuine insurance premium to cover the risk of having to pay out on the claim. If other additional costs are claimed as part of the premium (for instance the costs of providing a whole claims management package), then the costs of this must be stripped out to find the reasonable premium (**Claims Direct Test Cases** [2003] EWCA Civ 136 and **Accident Group Test Cases** [2004] EWCA Civ 575 [2004] 3 All ER 325). Quite how judges are supposed to achieve this, other than by a broad brush approach, is open to question. Once again, we are left with uncertainty.

38. Recently, we have had judgment in the **RSA Pursuit Test Cases** (Senior Costs Judge Hurst, 27th May 2005). This was a challenge to some very substantial premiums, primarily on the basis of how they had been calculated. Certain conclusions are clear from the lengthy judgment, though whether they will survive appeal remains to be seen.:

    (1) A premium may be calculated on the basis of a percentage of the solicitor's costs;

(2) The reasonableness should be compared by reference both to the value of the claim and the likely costs exposure – paragraph 261;

(3) The court still has to assess whether the premium is reasonable in all the circumstances – even if it is the only premium the Claimant was able to find - see paragraphs 264/5;

(4) The market is not a satisfactory test, primarily because the market in this are is inadequately developed – see paragraph 268

(5) Profit is irrelevant – if the premium is reasonable, the insurer can make as much or as little profit as it chooses – see paragraph 270;

(6) Premiums based on inherently arbitrary matters – in this case estimates of both sides costs – are likely to be inherently flawed – paragraph 346;

(7) Premiums based on costs are likely to have to be based on the costs as assessed, not as claimed, to be recoverable – paragraph 347;

(8) It is reasonable to reflect in the premium the costs of the premium in cases which are lost in cases where the premium is 'self insuring'; (paragraph 362);

(9) In contrast to case as where a CFA is unenforceable, where the premium is unreasonable the court should not disallow it is total, but should instead allow a reasonable sum – see paragraph 363.

39. It might be asked – if the market is not an adequate test and if the fact that experienced insurers are unwilling to enter a market and others will only offer policies at a certain price – how on earth is a provincial judge with no experience of insurance expected to assess whether

what is being charged for insurance in, say, a complex clinical negligence case is reasonable? How, if the court considers one figure (worked out by the insurer) to be too high, is the court to decide what is an acceptable figure?

40. These challenges are unlikely to go away in the near future. Until a stable market develops, there will be challenges to try and influence the market by forcing down the premiums which the court will allow. Once again, there must be scope for national agreements to help. However, the need for an open insurance market and the ability for insurers to depart from that if they wish provides an added level of complication not present when dealign with success fees.

41. As with two stage CFA's, the courts are expressing some preference for two (or more) stage insurance premiums – the premium starts low but at certain points increases to reflect increased costs (and risk). However, these again require a willing insurer who is content to withstand the initial challenges which will be made. An interesting ongoing case is that of **Tyndall v Battersea Dogs Home** (Master O'Hare, Supreme Court Costs Office)

COSTS CAPS AND ESTIMATES

Costs caps

1. Prospective control of costs is clearly desirable. It provides certainty and predictability. It should also help address the failure of the Civil Procedure Rules to adequately control costs. How to approach prospective control is the subject of considerable debate.

2. The need for parties to adopt a prospective approach to controlling costs was emphasised by Lord Woolf CJ early in the life of the CPR in **Jefferson v National Freight Carriers** [2001] 2 Costs LR 313 when he adopted HHJ Alton's approach and focused on the need for parties to make an assessment of costs at the outset of a claim so as to identify, for example, the level of fee-earner to be employed on the case and the time to be spent on it. Experience has shown that Lord Woolf's hopes in this regard have not been fulfilled and budgeting by solicitors alone is unlikely to be sufficient in every case. If there is to be real and effective control on costs expenditure, the Court itself must have power to impose limits. Thus, in **Griffiths v Solutia** [2001] EWCA Civ 736, [2002] PIQR P176, Mance LJ observed that judges should make full use of their powers to obtain costs estimates and that they should exercise their powers in respect of costs to keep them within the bounds of the proportionate in accordance with the overriding objective. The possibility of the Court imposing a cap on costs was raised, though how that would be achieved in practice was not addressed.

3. However, how effective is the costs cap as a means of restricting expenditure? It is clear that the Court believes they could be usefully employed: see Dyson LJ in **Leigh v Michelin** [2003] EWCA Civ 1766, [2004] 1WLR 846:-

"There is, however, much to be said for costs budgeting and the capping of costs. …We recognise that the use of CPR 43 PD para 6.6 to control costs by taking costs estimates into account at the assessment stage is not the most effective way of controlling the cost of litigation. It seems to use that the prospective fixing of costs budgets is likely to achieve that objective far more effectively."

When, and in what circumstances, should the Court impose a costs cap?

4. Are they only to be made in group litigation cases where costs can become very high? In **The Ledward Claimants** [2003] EWHC 2551 (QB), Hallett J made a costs capping order in a case where there had been a Group Litigation Order and eight lead cases identified. The parties were agreed on the need for a costs capping order and Hallett J was satisfied she had power to make such an order as a result of Section 51 Supreme Court Act 1981, the Court's wide ranging case management powers and the overriding objective, expressing concern that the costs would otherwise "spiral out of control, if they have not already done so". However, it is clear the Court does not regard the power to impose a costs cap as being restricted to group litigation only. In both **Smart v East Cheshire NHS Trust** [2003] EWHC 2806 and the **Nationwide Organ Group Litigation** [2003] EWHC 1034 (QB) Gage J observed that the imposition of a costs cap is not limited to GLO's and that the jurisdiction existed in other cases as well.

5. Are they though to be of universal application? Can practitioners expect to see them imposed as a matter of course? Each case will turn on its own facts. However, there is now considerable experience of how the issue will be approached in the context of clinical negligence cases. In S*mart*, Gage J observed that:-

"it seems to me very unlikely that it would be appropriate for the court to adopt a practice of capping costs in the majority of clinical negligence cases."

In his judgment, the correct test for the Court was that it should only consider making a costs cap where:-

i) the applicant shows by evidence that there is a real and substantial risk that without such an order costs will be disproportionately or unreasonably incurred ('spiralling out of control');

ii) that risk may not be managed by conventional case management (e.g. orders limiting the expert evidence allowed or defining the issues to be tried) and a detailed assessment of costs after a trial;

iii) it is just to make such an order.

Gage J stated that he would expect that in the ordinary run of cases it would be rare for the test to be satisfied. The Court also emphasised that there should not be a proliferation of expensive and lengthy applications for costs caps – the need for evidence to support the application and the risk of there then following expensive satellite litigation may well be factors which mean that, in practice, few such orders are made.

6. **Musa King v Daily Telegraph** [2004] EWCA Civ 613 provided an example of the use of costs caps in more unusual circumstances. It is, perhaps, unfortunate that it was only late in the day that the Defendant in this case

asked the court to order a cap on costs (at first instance and initially on appeal the application had been for security for costs). The case did, however, usefully provide Court of Appeal approval for the use of costs caps. Brooke LJ held that in defamation cases where the Claimant acted under a CFA without ATE insurance a capping order should be made as a matter of course at the allocation stage. However, as Brooke LJ pointed out, 'a costs capping regime is one thing. A costs capping regime in a CFA context is another'. Accordingly, the Court limited its decision to the very narrow circumstances set out. Guidance as to the use of costs caps in more general circumstances (and the principles to be adopted) will have to await a suitable case.

Recent Developments

7. In **Sheppard v Essex Strategic Health Authority** (2005), Hallett J was prepared to impose a costs cap where the estimated costs to trial were £516,000 (as opposed to the Defendants' estimate of £151,000) and there was apparently a very real dispute as to both liability and quantum. It was made clear that it was not necessary to make any adverse findings as to the way the solicitor had conducted the matter (unlike in *Ledward*). Nor did a costs cap carry any stigma or implied criticism. Hallett J accepted the submissions of the Defendant's counsel that there may come a time when such caps are standard, but considered that, at present, a case still required some unusual feature before a cap would be imposed.

8. However, the case of **Weir v Secretary of State for Transport** (2005) decided only a few weeks earlier indicates that the approach which will be adopted cannot yet be predicted with certainty. Lindsay J, in contrast to the approach of Hallett J, adopted the principles from *Smart*. Further, he considered that if the discretion to impose a cap was to be interpreted any wider, as an irreducible minimum the court would have to consider whether

the claim would be stifled if a cap was not imposed. Given the discretionary nature of the power to impose caps and the differing approaches adopted, it is likely that appellate guidance will be required before the position is resolved.

Costs estimates – the nearest thing to costs caps in most cases?

9. **Leigh v Michelin** [2003] EWCA Civ 1766, [2004] 1WLR 846

Here, the Court of Appeal had to consider how to deal with a costs estimate which was given at the allocation questionnaire stage of litigation, was not subsequently updated at the listing questionnaire stage, and which proved to be "hopelessly inadequate" when compared with the final bill of costs (i.e. costs to date of AQ were £3,000 plus VAT, final costs estimated at £6,000 plus VAT and the bill of costs was £21,741.28). The Court of Appeal held that a costs estimate may be taken into account in determining the reasonableness of the costs claimed on assessment in the following circumstances (although this was expressly said not to be an exhaustive list):-

a) Estimates of the overall costs of litigation should provide a useful yardstick by which the reasonableness of the costs finally claimed may be measured. If there is a substantial difference between the estimate and the final figure, then the difference calls for explanation. In the absence of a satisfactory explanation, the Court may conclude that the difference itself if evidence from which it can conclude unreasonableness.

b) The Court may take the estimate into account if the other party shows that it relied on the estimate in some way, giving the example of B being able to show he relied on A's estimate of costs in deciding not to

settle a case but to carry on with it in the belief that he knew his potential liability for costs if unsuccessful.

c) The Court may take the estimate into account if it would have made different case management decisions had it known the final costs would be much higher than the estimated ones, e.g. it would have reduced the number of experts for whom permission was given.

d) However, it would not be appropriate to use the estimate to reduce the costs payable simply because it was an inadequate estimate. If the other party did not rely on it, the Court would not have made different directions and the costs are otherwise reasonable and proportionate, it would be wrong to reduce the costs simply because they exceeded the estimate. To do so, would be tantamount to treating the estimate as a costs cap.

10. The final part of this conclusion leaves it unclear what sanction, if any, a court can apply properly if it concludes that any explanation is unsatisfactory and therefore the difference itself is evidence that the costs are unreasonable.

11. The Court of Appeal recognised the risk of satellite litigation about, for example, whether the Court would have made different case management decisions but concluded that, if the estimates could not be taken into account at the assessment stage, then there was in effect no point to them. Dyson LJ said that it should not be difficult to decide whether a paying party had relied on a costs estimate to his detriment or whether the Court would have made a different order without a lengthy and expensive investigation. Whether this is so remains to be seen.

12. In **Burns v Novartis Grimsby Ltd** (2004), the estimated costs at AQ were £17,500 to date and £35,000 in total but the amount claimed in the bill was £99,215.52 (excluding the premium and success fee, it was £71,082.20). However, the Claimants said the case had changed dramatically from the time of their estimate because of the progression of *Fairchild* through the Courts and it had become a contested case which went to trial. As a result, much more work was needed than originally anticipated and they should not be held to their original estimate. Although the Defendants did not then pursue their point on the costs estimate, it seems the argument about effect of *Fairchild* would have found favour with Master Hurst and he would have accepted that there was a satisfactory explanation for the substantial difference between the estimate and final bill. Once again, the way in which the court would have reflected the estimate on assessment in absence of a satisfactory explanation was not properly addressed.

13. The worth of estimates and whether the Court will given them teeth will hopefully be clarified in **Garbutt v Edwards**, which is awaiting judgment in the Court of Appeal. This case may have far reaching implications for both estimates and the future of CFA's in that it has provided the court with an opportunity to decide what, if any, sanction to impose on a solicitor for breaching the Costs Information and Client Care Code. The court has already rejected the argument that the mere fact of the breach – in a case where the client himself had no complaint and must have known what was going on – will not result in all costs being disallowed. It is, however, considering whether any sanction should be imposed for the breach.

14. If costs estimates are to be of any substantial benefit to parties then the conclusions reached in Leigh demonstrate that the time to address the estimate is at the case management stage of proceedings by, for example, seeking to limit the number of experts which may be called, rather than by

simply relying on an underestimate at detailed assessment. If the later course is to be pursued then a paying party will have a much stronger case if it can clearly show that it had regard to the estimates during the case and that it conducted its own case in light of the estimates which had been given.

15. If estimates are used properly by the courts, then the solicitors who will prosper are those with good case management procedures, accurate and efficient cost recording and the experience and ability to predict accurately the steps and costs which will be incurred. Those who do not master these skills will increasingly find themselves unable to recover all the costs they have incurred.

DISHONEST / EXAGGERATING CLAIMANTS

1. The courts are increasingly willing to use the Civil Procedure Rules to reflect 'true success' in a claim.

2. In particular, if a Claimant malingers or exaggerates in an attempt to recover a greater sum, the Defendant and his insurers are increasingly receiving the protection of the courts.

3. In **Painting v University of Oxford** [2005] EWCA Civ 161, the Court of Appeal was faced with a Claimant who sought £400,000 compensation for her back injury. Mrs Painting was awarded a little over £25,000 by the judge. The Defendant, late in the day, had produced video evidence which the judge concluded showed the Claimant had exaggerated her injuries and had misled the expert in the case.

4. The Defendant had originally paid almost £185,000 into court but, having received the video evidence, withdrew this leaving just £10,000. Despite the fact that Mrs Paining beat this figure at trial, the Court of Appeal had little difficulty in ordering Mrs Painting to pay the costs since the date the video evidence was disclosed. The University, since that point, had been the real winner. Mrs Painting's conduct had probably prevented early settlement of this case – not helped by her failure to make any counter offers to settle the case.

5. The court had already reached a similar conclusion in **Islam v Ali** [2003] EWCA Civ 612, in that case making no order as to costs despite a Claimant's apparent success in the case.

6. Clearly the issues are fact dependant, but it is now well established that it is not necessary to have to show that a Claimant who beats a Part 36 offer has been dishonest in order to deprive them of some of their costs. Exaggeration or other misconduct which has deprived the parties of a proper chance to settle the case or which has made the costs disproportionate is likely to be reflected in an adverse costs order.

REFUSAL TO MEDIATE

1. This is one area where we have relatively recently been supplied with a clear set of principles.

2. These were set out in firstly in **Dunnett v Railtrack** [2002] EWCA Civ 303 and then refined in **Halsey v Milton Keynes** [2004] EWCA Civ 576.

3. It is still for the loser to show why he should not pay the costs. But the court will consdier making a different order if the loser can persuade the court that the winner has unreasonably failed to go to mediation.

4. Relevant factors to be considered include:

    a. The nature of the dispute – is it one which would have lent itself to mediation or is it, for example, a significant point of principle which a party was entitled to a judicial decision on? A ‘sorry response’ (see Burchell below) that the issues are ‘technical’ and therefore not suited to mediation is not good enough.
    b. The merits of the case – why should a party with a case iron case be forced to mediate?
    c. Attempts at other methods of settlement – the flogging of a dead horse
    d. The costs of mediation. If the dispute is of low value, it may well be disproportionate to incur the costs of mediation. These can be substantial and care must be taken to ensure they are properly catered for in any final costs order.
    e. Delay – and the time at which the issue is raised. It may be that the time for mediation has passed.

f. The prospects of the mediation succeeding – though a party refusing mediation will not be allowed to benefit from his own obstinacy (Burchell).

5. The principles were reaffirmed by the Court of Appeal in **Burchell v Bullard** [2005] EWCA Civ 358 in April of this year. The Court of Appeal was (understandably) horrified that for a judgment ultimately worth £5,000, £185,000 of costs had been incurred. The only thing that saved the Defendant from being deprived of some of the costs he had otherwise been awarded costs was that the guidance in Halsey had not been given by the time the issue arose in this case. Future parties will not be so fortunate.

6. Perhaps most surprisingly, the party that had refused mediation below also refused to mediate the question of costs, despite the fact that a Court of Appeal scheme existed for this very purpose. We are not told in the judgement the Court of Appeal's decision in relation to the costs of the appeal, but it is not hard to imagine what it is likely to have been.

7. The courts are keen to encourage mediation and mediation schemes exists, for example, at Central London County Court (on a trial basis). In relation to costs, there is a 'Northern mediation Scheme'. These pilot schemes are likely to become more common but in the interim parties ignore requests for mediation at their peril. It is an increasingly common tactic for parties to propose mediation (even if they do not themselves genuinely wish to go through with it) in an attempt to give themselves some additional costs protection should they lose the case.

8. Lord Justice Ward perhaps summed it up best in Burchell:

"The court has given its stamp of approval to mediation and it is the legal profession which must become fully aware of and acknowledge its value. The profession can no longer shrug aside with impunity reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before a claim was issued … it may be folly to do so…defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives."

9. Perhaps most worryingly for both individuals and funders, it was made clear (albeit in obiter, by Lord Justice Rix) that a party may not even be able to rely on its solicitor's or expert's advice if they reject a request for mediation which was otherwise reasonable.

10. It follows that it will be a naïve and reckless solicitor or funder which does not have in place policies to deal with mediation requests and equally a well established system for proposing and carrying through mediation in appropriate cases. Not only does mediation have positive benefits, but ignorance of the benefits and risks may result in the satisfaction of winning a case being accompanied by the pain of nonetheless being deprived of the costs of having done so. Given the tight margins which exist and the many other issues already addressed, this is a luxury no-one can afford.

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