Butterworths Costs Service

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INTRODUCTION

We have reported on the most significant updates from 1 December 2012 to 21 February 2013. The last quarter has been extremely busy (some might even say exciting!), as the Jackson reforms due to be implemented on 1 April 2013 have been drafted and circulated.

On 21 January 2013 draft statutory instruments of the Damages-Based Agreements Regulations 2013 and Conditional Fee Agreements Order 2013 were laid before Parliament. These are to come into force on 1 April 2013. On 22 January 2013 the Offers to Settle in Civil Proceedings Order 2013 was also laid before Parliament and this Order came into force on 12 February 2013. It is now clear, therefore, that the "big bang" of the implementation of the Jackson reforms will take place on 1 April 2013. These Orders implement changes made by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). Due to the significance of the reforms, we have included the text of the relevant Regulations and Orders.

The Conditional Fee Agreements Order 2013

Section 44 of LASPO amended ss 58 and 58A of the Courts and Legal Services Act 1990 so that a success fee payable under a CFA may no longer be recovered by a lawyer from a losing party but, subject to additional controls, will be recoverable by a lawyer from their successful client. The new scheme in relation to CFAs is implemented by the CFA Order 2013 as follows:

Citation, commencement, interpretation and application

1—(1) This Order may be cited as the Conditional Fee Agreements Order 2013 and will come into force on 1 April 2013.

(2) In this Order—

"the 1986 Act" means the Insolvency Act 1986;

"the 1990 Act" means the Courts and Legal Services Act 1990;

"claim for personal injuries" has the same meaning as in r 2.3 of the Civil Procedure Rules 1998;

"company" means a company within the meaning of s 1 of the Companies Act 2006 or a company which may be wound up under Pt V of the 1986 Act;

"diffuse mesothelioma" has the same meaning as in s 48(2) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012;

"news publisher" means a person who publishes a newspaper, magazine or website containing news or information about or comment on current affairs;

"publication and privacy proceedings" means proceedings for—

(a) defamation;

(b) malicious falsehood;

(c) breach of confidence involving publication to the general public;

(d) misuse of private information; or

(e) harassment, where the defendant is a news publisher.

"representative" means the person or persons providing the advocacy services or litigation services to which the conditional fee agreement relates.

Agreements providing for a success fee

2. All proceedings which, under s 58 of the Act, can be the subject of an enforceable conditional fee agreement, except proceedings under s 82 of the Environmental Protection Act 1990(7), are proceedings specified for the purpose of s 58(4)(a) of the Act.

Amount of success fee

3. In relation to all proceedings specified in Art 2, the percentage specified for the purposes of s 58(4)(c) of the Act is 100%.

Specified proceedings

4. A claim for personal injuries shall be proceedings specified for the purpose of s 58(4A)(b) of the Act.

Amount of success fee in specified proceedings

5.—(1) In relation to the proceedings specified in Art 4, the percentage prescribed for the purposes of s 58(4B)(c) of the Act is—

(a) in proceedings at first instance, 25%; and

(b) in all other proceedings, 100%.

(2) The descriptions of damages specified for the purposes of s 58(4B)(d) of the Act are—

(a) general damages for pain, suffering, and loss of amenity; and

(b) damages for pecuniary loss, other than future pecuniary loss,

net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions.

Transitional and saving provisions

6.—(1) Articles 4 and 5 do not apply to a conditional fee agreement which is entered into before the date upon which this Order comes into force if—

(a) the agreement was entered into specifically for the purposes of the provision to a person ("P") of advocacy or litigation services in connection with the matter which is the subject of the proceedings; or

(b) advocacy or litigation services were provided to P under the agreement in connection with those proceedings before that date.

(2) Articles 4 and 5 do not apply to any conditional fee agreement entered into in relation to—

(a) proceedings relating to a claim for damages in respect of diffuse mesothelioma;

(b) publication and privacy proceedings;

(c) proceedings in England and Wales brought by a person acting in the capacity of—

(i) a liquidator of a company which is being wound up in England and Wales or Scotland under Pts IV or V of the 1986 Act; or

(ii)a trustee of a bankrupt's estate under Pt IX of the 1986 Act;

(d) proceedings brought by a person acting in the capacity of an administrator appointed pursuant to the provisions of Pt II of the 1986 Act;

(e) proceedings in England and Wales brought by a company which is being wound up in England and Wales or Scotland under Pts IV or V of the 1986 Act; or

(f) proceedings brought by a company which has entered administration under Pt II of the 1986 Act.

Comment: while much of the CFA Order 2013 has been anticipated, the transitional provisions (see para 6 above) may give rise to a number of issues (eg if counsel enter into CFAs after the 1 April 2013, or solicitors amend/vary CFAs after that date). Solicitors may also want to consider the impact of the transitional provisions on the nature of the retainer they agree with their clients (and when they enter into the retainer). It appears that the transitional

provisions have been designed to prevent firms agreeing speculative CCFAs or CFAs with their clients to seek to recover their success fees.

The Damages-Based Agreements Regulations 2013

The DBA Regulations 2013 introduce scope for private funding arrangements between a representative and a client whereby the representative's agreed fee is contingent on the success of the case and is determined as a percentage of the compensation recovered by the client as follows:

Citation, commencement, interpretation and application

1.—(1) These Regulations may be cited as the Damages-Based Agreements Regulations 2013 and come into force on 1 April 2013.

(2) In these Regulations—

"the Act" means the Courts and Legal Services Act 1990;

"claim for personal injuries" has the same meaning as in r 2.3 of the Civil Procedure Rules 1998;

"client" means the person who has instructed the representative to provide advocacy services, litigation services (within s 119 of the Act) or claims management services (within the meaning of s 4(2)(b) of the Compensation Act 2006) and is liable to make a payment for those services;

"costs" means the total of the representative's time reasonably spent, in respect of the claim or proceedings, multiplied by the reasonable hourly rate of remuneration of the representative;

"employment matter" means a matter that is, or could become, the subject of proceedings before an employment tribunal;

"expenses" means disbursements incurred by the representative, including the expense of obtaining an expert's report and, in an employment matter only, counsel's fees;

"payment" means that part of the sum recovered in respect of the claim or damages awarded that the client agrees to pay the representative, and excludes expenses but includes, in respect of any claim or proceedings to which these regulations apply other than an employment matter, any disbursements incurred by the representative in respect of counsel's fees;

"representative" means the person providing the advocacy services, litigation services or claims management services to which the damages-based agreement relates.

(3) Subject to paras (4), (5) and (6), these Regulations shall apply to all damages-based agreements entered into on or after the date on which these Regulations come into force.

(4) Subject to para (6), these Regulations shall not apply to any damages-based agreement to which s 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies.

(5) In these Regulations—

(a) regulation 4 does not apply; and

(b) regulations 5, 6, 7 and 8 only apply,

to any damages-based agreement in respect of an employment matter.

(6) Where these Regulations relate to an employment matter, they apply to all damages-based agreements signed on or after the date on which these Regulations come into force.

Revocation of 2010 Regulations and transitional provision

2.—(1) Subject to para (2), the Damages-Based Agreements Regulations 2010(6) ("the 2010 Regulations") are revoked.

(2) The 2010 Regulations shall continue to have effect in respect of any damages-based agreement to which those Regulations applied and which was signed before the date on which these Regulations come into force.

Requirements of an agreement in respect of all damages-based agreements

3. The requirements prescribed for the purposes of s 58AA(4)(c) of the Act are that the terms and conditions of a damages-based agreement must specify—

(a) the claim or proceedings or parts of them to which the agreement relates;

(b) the circumstances in which the representative's payment, expenses and costs, or part of them, are payable; and

(c) the reason for setting the amount of the payment at the level agreed, which, in an employment matter, shall include having regard to, where appropriate, whether the claim or proceedings is one of several similar claims or proceedings.

Payment in respect of claims or proceedings other than an employment matter

4.—(1) In respect of any claim or proceedings, other than an employment matter, to which these Regulations apply, a damages-based agreement must not require an amount to be paid by the client other than—

(a) the payment, net of—

(i) any costs (including fixed costs under Pt 45 of the Civil Procedure Rules 1998); and

(ii)where relevant, any sum in respect of disbursements incurred by the representative in respect of counsel's fees,

that have been paid or are payable by another party to the proceedings by agreement or order; and

(b) any expenses incurred by the representative, net of any amount which has been paid or is payable by another party to the proceedings by agreement or order.

(2) In a claim for personal injuries—

(a) the only sums recovered by the client from which the payment shall be met are—

(i) general damages for pain, suffering and loss of amenity; and

(ii)damages for pecuniary loss other than future pecuniary loss,

net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions; and

(b) subject to para (4), a damages-based agreement must not provide for a payment above an amount which, including VAT, is equal to 25% of the combined sums in para (2)(a)(i) and (ii) which are ultimately recovered by the client.

(3) Subject to para (4), in any other claim or proceedings to which this regulation applies, a damages-based agreement must not provide for a payment above an amount which, including VAT, is equal to 50% of the sums ultimately recovered by the client.

(4) The amounts prescribed in paras (2)(b) and (3) shall only apply to claims or proceedings at first instance.

Information required to be given before an agreement is made in an employment matter

5.—(1) In an employment matter, the requirements prescribed for the purposes of s 58AA(4)(d) of the Act are to provide—

(a) information to the client in writing about the matters in para (2); and

(b) such further explanation, advice or other information about any of those matters as the client may request.

(2) Those matters are—

(a) the circumstances in which the client may seek a review of costs and expenses of the representative and the procedure for doing so;

(b) the dispute resolution service provided by the Advisory, Conciliation and Arbitration Service (ACAS) in regard to actual and potential claims;

(c) whether other methods of pursuing the claim or financing the proceedings, including—

(i) advice under the Community Legal Service,

(ii)legal expenses insurance,

(iii)pro bono representation, or

(iv)trade union representation,

are available, and, if so, how they apply to the client and the claim or proceedings in question; and

(d) the point at which expenses become payable; and

(e) a reasonable estimate of the amount that is likely to be spent upon expenses, inclusive of VAT.

Additional causes of action in an employment matter

6. In an employment matter, any amendment to a damages-based agreement to cover additional causes of action must be in writing and signed by the client and the representative.

Payment in an employment matter

7. In an employment matter, a damages-based agreement must not provide for a payment above an amount which, including VAT, is equal to 35% of the sums ultimately recovered by the client in the claim or proceedings.

Terms and conditions of termination in an employment matter

8.—(1) In an employment matter, the additional requirements prescribed for the purposes of s 58AA(4)(c) of the Act are that the terms and conditions of a damages-based agreement must be in accordance with paras (2), (3) and (4).

(2) If the agreement is terminated, the representatives may not charge the client more than the representative's costs and expenses for the work undertaken in respect of the client's claim or proceedings.

(3) The client may not terminate the agreement—

(a) after settlement has been agreed; or

(b) within seven days before the start of the tribunal hearing.

(4) The representative may not terminate the agreement and charge costs unless the client has behaved or is behaving unreasonably.

(5) Paragraphs (3) and (4) are without prejudice to any right of either party under general law of contract to terminate the agreement.

Comment: whether as an intended (which appears could be the case from the Explanatory Note) or an unintended consequence of the drafting of the DBA Regulations 2013, it seems that hybrid/discounted agreements are prohibited. Paragraph 4 requires that "a damages-based agreement must not require an amount to be paid by the client other than…" (emphasis added), which suggests that a damages-based agreement must be all or nothing. We understand that this issue has been raised with the MOJ and it remains to be seen whether this restriction will be amended in advance of 1 April 2013 by a further statutory instrument.

Offers to Settle in Civil Proceedings Order 2013

This Order is made under s 55 of LASPO which permits a court to order an additional amount to be paid to a claimant by a defendant where the defendant does not accept the claimant's offer to settle and the court subsequently gives judgment for the claimant which is at least as advantageous to the claimant as the claimant's offer. The Order makes provision for calculation of that additional amount as follows:

Citation and commencement

1. This Order may be cited as the Offers to Settle in Civil Proceedings Order 2013 and shall come into force on 12 February 2013.

Additional amount to be paid where a claim is only for an amount of money

2. Where rules of court make provision for a court to order a defendant in civil proceedings to pay an additional amount to a claimant in those proceedings and the claim is for (and only for) an amount of money then, for the purposes of s 55(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the prescribed percentage shall be—

Amount awarded by the court	Prescribed percentage
Up to £500,000	10% of the amount awarded.
Above £500,000, up to £1,000,000	10% of the first £500,000 and 5% of the amount awarded above that figure.
Above £1,000,000	7.5% of the first £1,000,000 and 0.001% of the amount awarded above that figure.

Amount to be paid where a claim is or includes a non-monetary claim

3.—(1) Rules of court may make provision for a court to order a defendant in civil proceedings to pay an amount to a claimant ("the amount to be paid") in those proceedings where—

(a) the claim is or includes a non-monetary claim;

(b) judgment is given in favour of the claimant; and

(c) the judgment in respect of the claim is at least as advantageous as an offer to settle the claim which the claimant made in accordance with rules of court and has not withdrawn in accordance with those rules.

(2) The amount to be paid shall be calculated as prescribed in para (4).

(3) Rules made under para (1) may—

(a) include provision as to the assessment of whether a judgment is at least as advantageous as an offer to settle; and

(b) make provision as to the calculation of the value of a non-monetary benefit awarded to a claimant.

(4) Subject to sub-para (5), the amount to be paid shall be—

(a) if a claim includes both a claim for an amount of money and a non-monetary claim, the following percentages of the amount awarded to the claimant by the court (excluding any amount awarded in respect of the claimant's costs)—

Amount awarded by the court

Up to £500,000

Above £500,000, up to £1,000,000

Amount to be paid by the defendant

10% of the amount awarded.

10% of the first £500,000 and 5% of the amount awarded above that figure; and

(b) in a non-monetary claim only, the following percentages of any costs ordered by the court to be paid to the claimant by the defendant—

Costs ordered to be paid to the claimant

Up to £500,000

Above £500,000, up to £1,000,000

Amount to be paid by the defendant

10% of the costs ordered to be paid.

10% of the first £500,000 and 5% of any costs ordered to be paid above that figure.

(5) The amount to be paid shall not exceed £75,000.

The Offers to Settle Civil Proceedings Order 2013 requires implementation through amendments to the Civil Procedure Rules. We now address those amendments, and a substantial number of other amendments which are also being introduced.

Civil Procedure (Amendment) Rules 2013

The Civil Procedure Rules will be amended via the Civil Procedure (Amendment) Rules 2013 which come into force on 1 April 2013. These Rules were made on 31 January 2013 and laid before Parliament on 12 February 2013.

The key changes introduced by the Rules are (with new Civil Procedure Rules references in brackets):

(1) An amendment to the overriding objective to include the objective to deal with cases at proportionate cost (CPR 1.1(1) and 1.1(2)(i));

(2) The circumstances for the court to take into account when considering applications for relief from sanction (CPR 3.9) now expressly include the need:

(a) For litigation to be conducted efficiently and at proportionate costs; and

(b) To enforce compliance with rules, practice directions and orders;

(3) The division of CPR 3 into three parts, the first containing current rules on case management (CPR 3.1 – 3.11), the second containing new costs management provisions (CPR 3.12 – 3.18) and the third containing new costs capping provisions (CPR 3.19 – 3.21);

(4) An insertion into the Glossary of definitions of "Budget" and "Damages-based Agreement" (Glossary);

(5) Certain amendments to case management on the multi-track (CPR 29.1(2) and CPR 29.4)) and disclosure on the multi-track (CPR 31.5);

(6) The insertion of a new paragraph regarding directions about factual witness statements (CPR 32.2(3);

(7) An amendment to provisions relating to costs of expert evidence (CPR 35.4);

(8) An amendment to CPR 36 such that an additional amount, calculated by reference to prescribed percentage of the damages or costs awarded and not exceeding £75,000, may be recovered by a claimant beating its Pt 36 offer (CPR 36.14(3)(d));

(9) CPR 43 is revoked;

(10) CPR 44 to 48 are replaced with new Parts on costs as follows: CPR 43 General Rules about Costs; CPR 45 Fixed Costs; CPR 46 Costs – special cases; CPR 46 Provision for detailed assessment of costs and default provisions; CPR 48 Pt 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 relating to civil litigation funding and costs: transitional provision in relation to pre-commencement funding arrangements;

(11) The addition of provisions relating to Qualified One-Way Costs Shifting (CPR 44.13 – CPR 44.17);

(12) The addition of provisions relating to Damages-Based Agreements (CPR 44.18);

(13) The introduction of a rule relating to limitation of recoverable appeal costs (CPR 52.9A);

(14) The increase of the small claims track limit from £5,000 to £10,000 (CPR 26.6(3)).

The Rules are available at: http://www.legislation.gov.uk/uksi/2013/262/pdfs/uksi_20130262_en.pdf and reference should be made to the full text of the Rules for more details about the changes introduced.

Amendment to CPR r. 3.12(1)

The Civil Procedure Rule Committee has already re-visited the applicability of the costs management regime imposed by the new CPR 3.12(1) referred to above. The costs management regime will now not (automatically) apply to cases in the Chancery Division and Technology and Construction Court and Mercantile Courts where the amount in dispute is greater than £2m (not including interest and costs). The President of the Queen's Bench Division

and the Chancellor of the High Court have issued a document dated 18 February 2013, which provides for the following amendment to the new CPR 3.12(1):

"On further reflection, it has been recognised that it is undesirable for an exception from automatic costs management to apply only to the Admiralty and Commercial Courts, when in many commercial cases there is an element of concurrent jurisdiction between that court, the Chancery Division, the Technology and Construction Court and the London Mercantile Court, all of which function in the Rolls Building. Equally, outside London, the Chancery Division, Technology and Construction Court and Mercantile Courts have a similar concurrent jurisdiction.

Given these concurrent jurisdictions, the Civil Procedure Rule Committee at its meeting on 8 February 2013 approved the following amended r 3.12(1) to allow for a similar exemption from automatic costs management in all of those jurisdictions;

(1) This Section and Practice Direction 3E apply to all multi-track cases commenced on or after 1 April 2013, except–

(a) cases in the Admiralty and Commercial Courts;

(b) such cases in the Chancery Division as the Chancellor of the High Court may direct; and

(c) such cases in the Technology and Construction Court and the Mercantile Courts as the President of the Queen's Bench Division may direct,

unless the proceedings are the subject of fixed costs or scale costs or the court otherwise orders. This Section and the Practice Direction 3E will apply to any other proceedings (including applications) where the court so orders.

This rule will be included in a further Statutory Instrument which it is intended will be made so as to come into force on 1 April 2013.

At the same time a direction will be made under the amended CPR 3.12(1) in these terms:

> Pursuant to CPR r 3.12(1)(b) and (c), the Chancellor of the High Court directs that in the Chancery Division and the President of the Queen's Bench Division directs that in the Technology and Construction Court and Mercantile Courts, s II of CPR 3 and Practice Direction 3E shall not apply to cases where at the date of the first case management conference the sums in dispute in the proceedings exceed £2,000,000, excluding interest and costs, except where the court so orders.

The Master of the Rolls has been consulted on and agrees with this direction. Parity of approach in relation to Costs Management between these courts is considered to be important to avoid any inappropriate forum shopping as parties get used to the new rules. The revised rule is an interim measure, as it is thought that the case for any exception should be re-visited, given that under the rules there is a discretion which might be exercised in particular cases not to make a costs management order, which could deal with any

remaining concerns as to the appropriateness of costs management in high value cases. Also, after that review of the position, it will be desirable for the principle finally decided on to be incorporated in r 3.12(1) itself rather than in a direction.

Subject to the limited exceptions which will be dealt with in the direction, it is envisaged that costs management orders would be made in all cases except where there is good reason not to do so. Even when the exceptions in the rule and the direction apply, the use of costs management should always be considered."

Now some updates on important cases.

DIVISION A – CIVIL LITIGATION COSTS

COSTS BUDGETS

Sylvia Henry v News Group Newspapers Ltd [2013] EWCA Civ 19 (*Moore-Bick LJ, Aikens LJ, Black LJ*) *28/01/2013*

Facts: a defamation action arising out of the "Baby P" scandal settled with the defendant agreeing to pay the claimant's costs to be assessed if not agreed. The case had been conducted in line with the pilot costs management scheme for defamation cases contained in Practice Direction 51D which provides for the submission of detailed estimates of future base costs. Under para 5.6 of the Practice Direction a court is required, when assessing costs on the standard basis, to have regard to a party's last approved costs budget and not to depart from such a budget unless satisfied there is a "good reason" to do so. On assessment Senior Costs Judge Hurst determined as a preliminary issue that there was no good reason to depart from the approved costs budget even though the claimant could argue on assessment that her costs had been reasonably and proportionately incurred. The claimant appealed to the Court of Appeal.

Held: when considering whether there is a good reason to depart from an approved budget it is necessary to take into account all the circumstances of the case with particular regard to the objective of the costs budgeting regime. Whilst the Court of Appeal declined to provide an exhaustive definition of the circumstances in which there would be such a good reason, it was held that a court would not allow costs in excess of the budget unless something unusual had occurred. The Senior Costs Judge had misunderstood the reference in the Practice Direction to the parties being on an equal footing and taken too narrow a view of what may amount to a good reason to depart from an approved budget. The reference to equal footing was concerned with the unfair exploitation of superior resources rather than with the provision of information about how expenditure is progressing. A failure to exchange information did not of itself put the parties on an unequal footing within the meaning of the Practice Direction. The fact that a party had not complied with all the requirements of the Practice Direction was a factor which a court could take into account in determining whether to allow departure from the costs budget but it was not essential that a party comply with all the Practice

Direction's requirements in order to be allowed to so depart. Budgets were not intended to act as a cap since courts may depart from them where there is a good reason to do so. It had been open to the Senior Costs Judge to find that the essential objects of the costs management scheme had not been frustrated. In those circumstances, he was obliged to consider all the circumstances of the case, including the extent to which the parties and the court had exercised their respective responsibilities under the scheme, the way in which the proceedings had developed, the response of the claimant's solicitors to the demands imposed by the way in which the defendant's case developed and the defendant's agreement to pay the claimant's costs as part of the compromise of the claim. It was an important factor that the claimant would not recover the costs of the action unless the court departed from the budget. That alone would not be enough; if it were the scheme would be otiose, but it was an important factor to the extent that on examination the court was persuaded that the costs incurred were reasonable and proportionate. The claimant's failure to observe the requirements of the Practice Direction had not put the defendant at a significant disadvantage nor led to the incurring of unreasonable or disproportionate costs. It would be unreasonable and disproportionate to penalise the claimant by refusing to depart from the budget simply because of non-compliance with the Practice Direction, especially in the context of proceedings which were constantly changing. It was also relevant that the defendant had exceeded its costs budget and that the court had not been sufficiently active in monitoring the parties' expenditure. Obiter, there are differences between the defamation pilot scheme and the new version of the Civil Procedure Rules coming into force in April 2013: the latter imposes greater responsibility on the court for costs management, on the parties for keeping budgets under review and lays greater emphasis on the importance of the approved or agreed budget as providing a *prima facie* limit on the quantum of recoverable costs. Although the court would be able to depart from an approved or agreed budget if satisfied that there was a good reason to do so, where budgets were approved by the court and regularly revised, a receiving party would be unlikely to persuade a court that costs incurred in excess of a budget were reasonable and proportionate to what was at stake.

Comment: although the Court of Appeal held that the new costs management scheme is different to the defamation costs pilot, the guidance given is still likely to be significant when the courts are being asked to depart from costs budgets under the new Civil Procedure Rules. Indeed, the Court of Appeal (perhaps surprisingly) decided to depart from the strict approach taken by the Senior Costs Judge, which gives rise to greater uncertainty in the application of what constitutes a "good reason".

PART 36 OFFERS

Webb Resolutions Ltd v Waller Needham & Green* (*a firm*) *[2012] EWHC 3529* (*Ch*) (*Mr John Baldwin QC, sitting as a Deputy Judge of the Chancery Division*) *11/12/12

Facts: the claimant mortgage lender brought a professional negligence claim against its former solicitors in relation to a loan that it had made secured on a residential property. The lender sent a letter of claim purportedly in accordance with the Professional Negligence Pre-Action Protocol. The solicitors repeatedly sought disclosure of documents in order to prepare their letter of response and to assess their liability. The lender provided some documents but refused to provide others on the basis that they were not essential for the solicitors to assess liability. The lender refused to provide any further documents until liability was admitted. Following the issuing of proceedings, the lender provided disclosure and the defendant accepted a Pt 36 offer out of time. The lender sought an order for its costs on the standard basis contending that this was the normal order when Pt 36 offers are accepted out of time. The solicitors contended that the lender was entitled to its costs only up until the date that the solicitors had requested disclosure of some documents and that the solicitors should have its costs thereafter or, alternatively, that the lender should have its costs up to 21 days after the Pt 36 offer and that it should have its costs or there should be no order as to costs thereafter. The solicitors relied on the lender's failure to comply with the Protocol in its unreasonable approach to disclosure.

Held: the normal order in such a case under CPR 36.10(5) was that the claimant would have its costs up to the date of the defendant's acceptance of the offer. However, a court could depart from the normal order where it would be unjust not to do so in line with the principles in CPR 36.14. All the circumstances of the case, including those expressly set out in CPR 36.14(4), had to be taken into account. It was necessary to assess whether there had been substantial compliance with the Protocol or whether sanctions might be appropriate. The Protocol aimed to encourage early exchange of information so that claims can be fully investigated and resolved, if possible, without the need to resort to litigation. Sanctions would only be imposed if there was substantial non-compliance with the Protocol. Whilst some of the early disclosure requests may have been too ambitious, it was clear that the solicitors were placing emphasis on two important files and explaining why disclosure of those files was necessary to enable proper consideration of the claim. A claimant acting reasonably would have supplied copies of those files at an early stage and not merely extracts therefrom. However, the lender had refused to supply such files without good reason or had failed to respond to the letters of request. This was not in accordance with the Protocol. It was also acting well outside the letter and spirit of the Protocol to refuse to provide documentation until liability was admitted. Accordingly, the normal order under CPR 36.10(4) would be unjust. Granting the solicitors their costs from the date they requested disclosure would place the solicitors in a better position qua costs than they would have been had they accepted the Pt 36 offer within the stipulated period. However, due to the claimant's failure to

proceed in accordance with the Protocol it would be unjust to require the defendant to pay any costs after the claimant's letter of 17 June 2011 which stated that the six month negotiation period had expired and gave 14 days notice that proceedings would be commenced. It was significantly more likely than not that costs incurred after 17 June 2011 would not have been incurred had the lender acted reasonably and responded to the disclosure requests. Therefore, the lender should have its costs until 17 June 2011 but should pay the solicitors' costs incurred thereafter to be assessed on the standard basis if not agreed.

Comment: this decision provides further guidance on when the normal order for costs after a late acceptance of a Pt 36 offer under CPR r.36.10(5) will be displaced, and highlights the potential consequences of taking an unreasonable pre-action approach (particularly in respect of disclosure).

NON-PARTY COSTS ORDERS

Relfo v Varsani [2012] EWHC 3848 (*Ch*) (*Sales J*) *20/12/2012*

Facts: the liquidator of the claimant company applied for a non-party costs order against two respondents. The liquidator had brought proceedings to recover monies diverted from the company by one of the respondents to the other respondent's son. Although neither respondent had been a party to the substantive proceedings, which had resulted in a judgment in July 2012, Sales J had been highly critical of their evidence and had found that they had had a large role in the matters that had been in issue.

Held: non-party costs orders were exceptional matters and the court should approach such applications with caution, *Symphony Group v Hodgson* [1994] QB 179 applied. However, the respondents were to be regarded as a "real party" to proceedings as they had stood to benefit in a material way from the defence case, had exercised a significant degree of control over the conduct of the proceedings and provided funding for the proceedings, *Dymocks Franchise Systems* (*NSW*) *Pty Ltd v Todd* (*Costs*) [2004] UKPC 39, [2004] 1 WLR 2807 considered. Accordingly, it was just and fair a non-party costs order should be made against the respondents. Although the respondents had not been warned that such an order would be sought against them, the full basis of their involvement had not become clear until it emerged during evidence at trial and it had not been realistic to issue a warning before judgment had been received. The respondents had had a full opportunity to explain the funding arrangements for the defence at trial and had been able to adduce further witness evidence. The application was granted and a non-party costs order was made against the respondents on joint and several liability and indemnity bases.

Comment: this decision further illustrates when a non-party costs order can be made. In particular, Sales J held that it is not a mandatory requirement that the parties against whom a non-party costs order is sought have been provided with a warning that such an application may be made. It is only a material consideration which has to be weighed alongside others.

DIVISION E- LITIGATION FUNDING

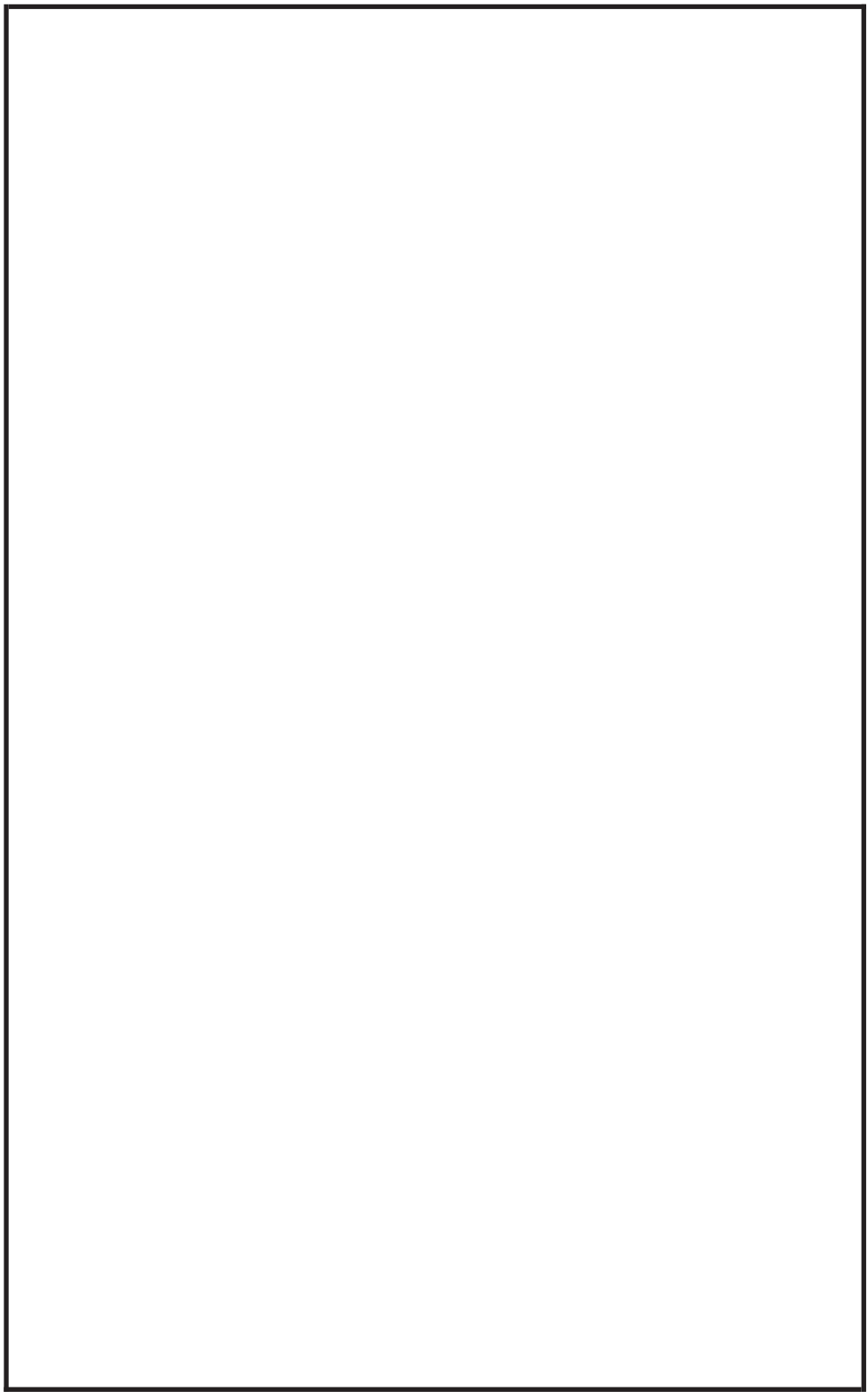
(*1*) *Christine Brown-Quinn* (*2*) *Webster Dixon LLP & Ors v* (*1*) *Equity Syndicate Management Ltd* (*2*) *Motorplus Ltd [2012] EWCA Civ 1633* (*Longmore LJ, Lloyd LJ, McFarlane LJ*) *12/12/2012*

Facts: three insureds had the benefit of legal expenses insurance ("LEI") with the appellant company, Equity Syndicate Management Limited ("the insurer"), and wished to bring employment and discrimination claims. Webster-Dixon was a firm of solicitors who acted for the three insureds but was not one of the insurer's panel firms. The insurer refused to agree to Webster-Dixon acting for the insureds unless it agreed not to charge more than the fixed hourly (but non-panel) rate prescribed under the insurer's terms. The insureds and Webster-Dixon brought proceedings seeking a declaration that the insurer's position represented a fetter upon a client's right to choose his solicitor which breached reg 6 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990. The insurer conceded at trial that the insureds were not restricted to recovering the non-panel rate and Burton J held that the insurer was not entitled to decline to accept the insured's choice of solicitor on the basis that their rates were higher than the non-panel rate. The insurer appealed seeking to withdraw the concession that the insureds were not restricted to recovering the non-panel rate.

Held: the insurer's application to withdraw its concession so as to argue that the insureds were restricted to the recovery of non-panel rates was permitted. A refusal to accept the appointment of an insured's choice of representative on that basis that he would only be accepted if he charged no more than the non-panel rates would be a serious inhibition of freedom of choice and thus contrary to the 1990 Regulations. On consideration of the terms of the particular LEI policy, the insureds were only entitled to recover the non-panel rate set out in the standard terms and conditions, but they were entitled to recover those rates. It would be a decision for an insured to make if it wanted to pay more to its chosen solicitors via another payment method. The fact that some potential insureds would be unable to pay extra to secure the solicitors of their choice could not mean that all insureds can always choose any solicitor however expensive and expect their insurer to pay. Applying the decision of the European Court of Justice in *Stark v DAS Öesterreichische Allgemeine Rechtsschutz Versicherung* AG (C-293/10), it was held that Insurers can seek to limit the costs for which they are liable to the insured provided that the freedom of choice guaranteed by the European Directive (implemented by the 1990 Regulations) is not rendered meaningless. A court determining whether the remuneration offered by the policy is so insufficient as to render the insured's choice meaningless would need evidence of such insufficiency before it could avoid or strike down any provision in an insurance policy relating to the level of costs and expenses payable in respect of a solicitor's services. There was no such evidence here and so it was not possible to say that the insurer could not rely on the term restricting the insureds' indemnity to the non-panel rate. Therefore, the insurer would pay the non-panel rate but no more. The conditions in the insurance policy providing that the insurer could decline to accept the insureds' choice of

representative and that the cover would end if the insured's appointed representative refused to continue to act or if the insured dismissed an appointed representative were in breach of the 1990 Regulations and would need to be deleted or comprehensively redrafted.

Comment: insurers should take note of the impact of this decision on whether their policies are legitimate or, perhaps more significantly, whether their policies can include terms restricting the level of solicitors' fees they are obliged to pay. Of particular importance is that insureds are protected in their choice of legal representative, but such protection will not usually extend to payment of the solicitors' fees greater than panel firms (although each case will depend on the specific terms of the policy).



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