Butterworths Costs Service

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INTRODUCTION

We have reported on the most significant developments between February and June 2012.

First some news and updates on the implementation of the Jackson reforms.

ATE Premiums Remain Recoverable

In a written ministerial statement to Parliament on 24 May, the government announced that CFA success fees and ATE insurance premiums will continue to be recoverable in insolvency proceedings until April 2015. Recoverability in all other types of case is to be abolished from April 2013 on implementation of the relevant provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, subject to further exceptions for mesothelioma claims (pending a review) and insurance premiums for expert reports in clinical negligence cases. The statement said:

> "Insolvency cases bring substantial revenue to the taxpayer, as well as other creditors, and encourage good business practice which can be seen as an important part of the growth agenda with wider benefits for the economy. These features merit a delayed implementation to allow time for those involved to adjust and implement such alternative arrangements as they consider will allow these cases to continue to be pursued."

Costs Budgets

The Civil Procedure Rule Committee has approved an amendment to the Civil Procedure Rules (CPR) to introduce "costs management" procedures more widely from April 2013. The procedures will apply to all multi-track cases commenced on or after 1 April 2013 in both the county court and the High Court.

The procedures will not, however, apply to the Commercial Court (unless the court orders that they should apply in a particular case). This is consistent with Lord Justice Jackson's view, as stated in his final report following his costs review, that no case had yet been made out for introducing costs management in the Commercial Court.

Lord Justice Jackson's final report recommended that judges should have a discretion to adopt "costs management" procedures where these would be beneficial for a particular case. Following a pilot of these procedures in the Birmingham Mercantile Court and Technology and Construction Court (TCC), the pilot was extended to all Mercantile Courts and the TCC through a new Practice Direction from 1 October 2011 A separate pilot has also been conducted in defamation cases – a leading case this last quarter considered the meaning of "good reason" within that scheme. This is reported on in more detail later in this bulletin.

Under the new rules, within 28 days after the defence is filed, all parties (except litigants in person) will have to file and exchange budgets setting out their estimated costs for each stage in the proceedings. Any party which fails to file a budget when required to do so will be treated as having filed a budget comprising only the applicable court fees. The court may at any time make a "costs management order", in which it will record the extent to which the budgets are agreed between the parties, or (to the extent not agreed) record the court's approval of a budget, if necessary after making appropriate revisions.

When assessing costs, the court will have regard to a party's last approved or agreed budget and will not depart from it unless satisfied that there is good reason to do so.

There are two particular aspects which will be important when costs management is introduced from April 2013.

First, the court will have to apply new proportionality test to the costs budget. As stated in the Final Report, the judge carrying out costs management will not only scrutinise the reasonableness of each party's budget, but also stand back and consider whether the total sums on each side are "proportionate" in accordance with the new definition. If the total figures are not proportionate, then the judge will only approve budget figures for each party which are proportionate. Thereafter if the parties choose to press on and incur costs in excess of the budget, they will be litigating in part at their own expense. It will be important for judges to apply the test consistently and for parties and their lawyers to be aware of the impact on recoverable costs.

Secondly, the court, in deciding what directions to give, will have to consider the cost impact of those steps. A good example is disclosure where, particularly with electronic disclosure, costs can soon become disproportionate. The court will have to question whether, for instance, it is proportionate to have standard disclosure or whether the costs of more limited disclosure is a proportionate way of proceeding in a particular case. Other examples of cases where the court will have to consider the impact of costs include expert evidence and witness statements.

The New Costs Budget Rules

Additions to CPR 3

II. Costs Management

3.12. (1) This Section and Practice Direction 3E apply to all multi-track cases commenced on or after 1 April 2013 in:

(a) a county court or

(b) the Chancery Division or Queen's Bench Division of the High Court (except the Admiralty and Commercial Courts) unless the proceedings are the subject of fixed costs or scale costs or the court otherwise orders. This section and Practice Direction 3E shall apply to any other proceedings (including applications) where the court so orders.

(2) The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective.

3.13. Unless the court otherwise orders, all parties except litigants in person must file and exchange budgets as required by the rules or as the court shall otherwise direct. Each party must do so within 28 days after service of any defence.

3.14. Unless the court otherwise orders, any party which fails to file a budget despite being required to do so shall be treated as having filed a budget comprising only the applicable court fees.

3.15. (1) In addition to exercising its other powers, the court may manage the costs to be incurred by any party in any proceedings.

(2) The court may at any time make a "costs management order". By such order the court will:

(a) record the extent to which the budgets are agreed between the parties;

(b) in respect of budgets or parts of budgets which are not agreed, record the court's approval after making appropriate revisions.

(3) If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs.

3.16. (1) Any hearing which is convened solely for the purpose of costs management (for example, to approve a revised budget) is referred to as a "costs management conference".

(2) Where practicable, costs management conferences should be conducted by telephone or in writing.

3.17. (1) When making any case management decision, the court will have regard to any available budgets of the parties and will take into account the costs involved in each procedural step.

(2)Paragraph (1) applies whether or not the court has made a costs management order.

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."

New Practice Direction 3E – Costs Management

1. Unless the court otherwise orders, a budget must be in the form of Precedent H annexed to this Practice Direction. It must be in landscape format with at least 12 point typeface. In substantial cases, the court may direct that budgets be limited initially to part only of the proceedings and subsequently extended to cover the whole proceedings. A budget must be dated and verified by a statement of truth signed by a senior legal representative of the party. In cases where a party's budgeted costs do not exceed £25,000, there is no obligation on that party to complete more than the first page of Precedent H.

2. If the court makes a costs management order under r 3.15, the following paras shall apply.

3. Save in exceptional circumstances:

(a) The recoverable costs of initially completing Precedent H shall not exceed the higher of £1,000 or 1% of the approved budget.

(b) All other recoverable costs of the budgeting and costs management process shall not exceed 2% of the approved budget.

4. If the budgets or parts of the budgets are agreed between all parties, the court will record the extent of such agreement. In so far as the budgets are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgets. The court's approval will relate only to the total figures for each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgets, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

5. As part of the costs management process the court may not approve costs incurred before the date of any budget. The court may, however, record its

comments on those costs and should take those costs into account when considering the reasonableness and proportionality of all subsequent costs.

6. The court may set a timetable or give other directions for future reviews of budgets.

7. Each party shall revise its budget in respect of future costs upwards or downwards, if significant developments in the litigation warrant such revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of agreement, the amended budgets shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party. The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed.

8. After its budget has been approved, each party shall re-file the budget in the form approved with re-cast figures, annexed to the order approving it.

9. A litigant in person, even though not required to prepare a budget, shall nevertheless be provided with a copy of the budget of any other party.

10. If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets.

Amendment to Costs Practice Direction, Section 6

Section 6 Costs Budgets

6.1. In any case where the parties have filed budgets in accordance with Practice Direction 3E but the court has not made a costs management order under r 3.15, the provisions of this section shall apply.

6.2. If there is a difference of 20% or more between the costs claimed by a receiving party on detailed assessment and the costs shown in a budget filed by that party, the receiving party must provide a statement of the reasons for the difference with his bill of costs.

6.3. If a paying party:

(a) claims that he reasonably relied on a budget filed by a receiving party; or

(b) wishes to rely upon the costs shown in the budget in order to dispute the reasonableness or proportionality of the costs claimed; the paying party must serve a statement setting out his case in this regard in his points of dispute.

6.4. On an assessment of the costs of a party, the court may have regard to any budget previously filed by that party, or by any other party in the same proceedings. Such a budget may be taken into account when assessing the reasonableness and proportionality of any costs claimed.

6.5. (a)Without prejudice to para 6.4, this paragraph applies where there is a difference of 20% or more between the costs claimed by a receiving party and the costs shown in a budget filed by that party.

(b) Where it appears to the court that the paying party reasonably relied on the budget, the court may restrict the recoverable costs to such sum as is reasonable for the paying party to pay in the light of that reliance, notwithstanding that such sum is less than the amount of costs reasonably and proportionately incurred by the receiving party.

(c) Where it appears to the court that the receiving party has not provided a satisfactory explanation for that difference, the court may regard the difference between the costs claimed and the costs shown in the budget as evidence that the costs claimed are unreasonable or disproportionate.

"Good Reason" For Departing From a Budget

Of particular relevance to the above provisions is the case of *Sylvia Henry v News Group Newspapers Ltd* heard by the Senior Costs Judge on 16 May 2012.

This was the first case under the Defamation Proceedings Costs Management Scheme piloted under CPR PD 51D in which costs fell to be determined, the court was required to determine a preliminary issue in the assessment of costs following a settlement in favour of the claimant. The claimant was a social worker who had worked on cases in which children died while known to social services. The defendant newspaper publisher had published defamatory articles regarding her conduct in those cases. Shortly before trial, the proceedings were settled with an apology and damages. Both parties had exceeded the costs budgets which the court had approved under the Scheme at a case management conference. The defendant had sought to discuss and exchange budgets pursuant to PD 51D before the conference, but the claimant had not given a substantive response. During proceedings the defendant amended its defence four times and also served 10 lists of documents. The defendant was unaware that the claimant had exceeded her approved budget until a month from the scheduled start of the trial and two weeks before the case was settled. The issue for determination was whether there was good reason to depart from the approved budget pursuant to PD 51D, para 5.6.

The claimant argued that the defendant's actions had given rise to extra work that justified finding good reason to depart from the budget. The defendant argued that the claimant had failed to comply with the terms of PD 51D.

Held: The provisions of PD 51D were in mandatory terms. Its objective was to manage litigation so that each party's costs were proportionate to the value of the claim and the reputational issues at stake, and so that the parties were on an equal footing. If one party was unaware that the other's budget had been significantly exceeded, they were no longer on an equal footing. The claimant had largely ignored the provisions of PD 51D and there was therefore no good reason to depart from the budget (see paras 64–69 of judgment).

Comment: Permission to appeal has been granted to the claimant and there is every possibility that the appeal will be heard by the Court of Appeal. However, for the time being the case represents a salutary warning to parties to ensure that in a case where a costs management order is made, the parties ensure compliance with its objectives and continue a dialogue as to the level of costs incurred and whether the court approved budget remains an accurate reflection of the likely costs to be incurred.

Proportionality under Jackson

In the 15 Lecture in the implementation of the Jackson Reforms given by Lord Neuberger of Abbotsbury, Master of the Rolls, we learnt more about how the new rule on proportionality is intended to operate.

The new rule will state as follows:

"44.4(5) Costs incurred are proportionate if they bear a reasonable relationship to:

(a) the sums in issue in the proceedings;

(b) the value of any non-monetary relief in issue in the proceedings;

(c) the complexity of the litigation;

(d) any additional work generated by the conduct of the paying party; and

(e) any wider factors involved in the proceedings, such as reputation or public importance."

We quote from various passages of the Lecture:

> "… It would be positively dangerous for me to seek to give any sort of specific or detailed guidance in a lecture before the new rule has come into force and been applied. Any question relating to proportionality and any question relating to costs is each very case-sensitive, and when the two questions come together, that is all the more true. The law on proportionate costs will have to be developed on a case by case basis. This may mean a degree of satellite litigation while the courts work out the law, but we should be ready for that, and I hope it will involve relatively few cases.
>
> "Obviously, the amount of money involved will normally be a very significant factor, but it will not be determinative, and there will be issues such as whether one looks at the sum reasonably claimed or the sum recovered. Difficult questions may arise when one party claims that the point at issue is very important to him or her even though, objectively speaking, it is of little significance. Objective perspectives may well be more important than subjective ones in this area, but that remains to be assessed. And is the approach to proportionality to be the same for defendants' costs as it is for those of claimants? Such issues will have to be worked out, but the working out will involve the Judges exercising that quality which they are pre-eminently expected to have, namely judgment."

"A new approach to litigation costs based on proportionality should produce a culture which sees litigation conducted at proportionate, more economical and thereby lower, cost. This in turn should help to create a culture where costs assessments at the conclusion of proceedings are, ultimately, reduced in scope, as parties will, through effective proportionate costs management, ensured that proceedings were conducted, and charged to the parties, at proportionate cost. In other words, the application of proportionality at the costs management stage should, in an ideal world, avoid any need for assessments after the substantive hearing. However, not only would one have to be naive to believe that will be the reality, especially in the first few years of the new regime. It is also true that proportionality can only be finally assessed at the end of a case."

DIVISION A – CIVIL LITIGATION COSTS

Orders for Costs

M v Croydon London Borough Council [2012] EWCA Civ 595, (Lord Neuberger (MR), Hallett LJ, Stanley Burnton LJ), 8 May 2012

Facts: The appellant appealed against a decision making no order for costs where the respondent local authority conceded the relief sought. The appellant had applied for asylum claiming to have been born in 1996 and aged 12. The local authority assessed him as 14. The matter was disputed between the parties culminating with the issue of proceedings. The local authority eventually conceded that the appellant was born in 1996 but were not prepared to agree to pay his costs of the proceedings. The judge held that the just result was no order as to costs as the outcome was not clear from the outset given the dynamic development of the law in that area whilst the claim was live. The appellant appealed.

Held: (1) The position where cases settled in the Administrative Court should be no different from general civil litigation, where the general rule under the CPR, r 44.3(2) applied. Where a claimant obtained all the relief he sought, whether by consent or after a contested hearing, he was the successful party who was entitled to all his costs, unless there was a good reason to the contrary. However, where a claimant obtained only some of the relief which he sought the position on costs was obviously more nuanced, *R* (*on the application of Scott*) *v Hackney LBC* [2009] EWCA Civ 217 and *R* (*on the application of Boxall*) *v Waltham Forest LBC* (2001) 4 CCL Rep 258 applied. In such cases there could be argument as to which party was more successful in light of the relief which was sought and not obtained, or, even if the claimant was accepted to be the successful party, there might be an argument as to the importance of the issue, or costs relating to the issue, on which he failed. In Administrative Court cases, just as in other civil litigation, particularly where a claim had been settled, there was a sharp difference between a case where a claimant had been wholly successful and a case where he only succeeded in part and a case where there had been some compromise which did not reflect the claimant's claims. Whilst the allocation of costs would

depend on the specific facts, where a claimant had been wholly successful there was no reason why he should not recover his costs. Where he only partially succeeded, the court would normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim and how much the costs were increased as a result of pursuing the unsuccessful claim. In a case where there had been some compromise which did not actually reflect the claimant's claims the court was often unable to gauge whether there was a successful party in any respect. In such cases there was a powerful argument that the default position should be no order for costs.

Comment: An important case on the proper incidence of costs in administrative law cases where there is monetary judgment. It will be an important case too outside of the field of administrative law in those cases where the only relief sought is declaratory non-monetary relief. Of particular interest is the suggestion that in cases which settle it might be sensible to look at the underlying claims and ask whether it was tolerably clear who would have won if the matter had not settled (see paras 58–63 of judgment). It might be thought doubtful that it would ever be tolerably clear one way or the other.

Costs of Detailed Assessment

Rangos v Secretary of State for Business Innovation and Skills and another (*2012*), *Ch D* (*Judge Cooke QC*), *24 February 2012*

Facts: The claimant had won the underlying proceedings and served a bill of costs on the respondent. The respondent offered to settle the costs claimed at £85,000. The claimant declined the offer and sought a detailed assessment. After an additional year of litigation and a five-day hearing the master assessed costs at only £1,176 more than the offer and ordered the claimant to pay for costs of the detailed assessment from the date the offer was rejected. The claimant appealed. The issue for consideration was whether the master had been wrong in his application of *Carver v BAA Plc* [2008] EWCA Civ 412, [2009] 1 WLR 113.

Held: Rule 47.18 required the master to exercise two discretions: (a) whether to depart from the starting point of awarding the costs of the assessment to the receiving party by making "some other order", and (b) what form of "some other order" to make. In exercising those discretions the master had taken into account, as he had been required to do under CPR, r 47.19, the fact that an offer had been made. It had been up to the master to weigh that factor and what effect it had. He had undoubtedly been entitled to consider the fact that the offer had been reasonable and would have brought matters to an end, saving vast additional costs. The master had not treated Carver as requiring him to come to a particular conclusion; he had merely considered the case by analogy when considering the impact of the rejection of a reasonable settlement offer, Carver considered. The master had therefore correctly exercised his discretion.

Comment: So one rule for Pt 36 and one for Pt 47? Under Pt 36 the rules now provide that however small the increase on the rejected offer that will amount to an improvement on the offer entitling the offeree to costs.

Fixed Costs

Corby Dockerill* (*by his mother and litigation friend Zoe Dockerill*), (*2*) *Demi Healey* (*by her mother and litigation friend Zoe Dockerill*) *v S Tullett; Paddy Macefield* (*by his litigation friend Paula Macefield*) *v Janos Bakos; Rebecca Tubridy* (*by her litigation friend D Westwood*) *v Mohammed Sarwar [2012] EWCA Civ 184, CA* (*Civ Div*) (*Arden LJ, Carnwath LJ, Patten LJ*), *24 February 2012

Facts: In conjoined appeals, the court was required to determine claims by minors to recover the costs of proceedings brought by them under CPR r.21.10(2) for the approval of the compromise of their claims for damages for personal injuries.

In the first appeal, the claim for damages by the appellants was compromised for a sum below £1,000, and referred to a deputy district judge for approval under CPR, r 21.10(2). He held that that application amounted to a Pt 8 claim and not, therefore, one to be allocated to the small claims track, and he awarded predictive costs under CPR, r 45, Pt II. The defendant appealed, and the judge held that the claim referred to in CPR, r 45.7(2)(d) was the claim which, but for the compromise, would have been issued for the amount of the agreed damages and not the claim for approval under CPR, r 21.10(2). He found that the normal track for that claim would have been the small claims track under CPR r.26.6, and he therefore ordered the detailed assessment of costs on the standard basis under CPR, r 44.5 with the costs being assessed by reference to what would have been recovered had the case been tracked to the small claims track.

In the second appeal, the appellant was a child whose claim for damages was settled at £750. The district judge ordered the payment of predictive costs. The defendant in that case also appealed, and the judge held that there should be a detailed assessment but unfettered by reference to the small claims track.

In the third appeal, damages for the claimant were agreed at £2,100 and the court's approval was sought. The claimant was represented by counsel. The district judge summarily assessed costs and allowed £200 in respect of counsel's fee for attending the hearing. The defendant appealed on the ground that that counsel's costs were not necessarily incurred and the attendance should have been met as part of the fixed recoverable costs payable under CPR, r 45.9. The judge dismissed the appeal, having found that the instruction of counsel was justified since it was essential that a child had the best skills available. The defendant appealed.

Held: (1) A costs judge was required to look realistically at the underlying claim for damages which had been settled and consider whether the costs claimed in the Pt 21.10(2) proceedings were proportionate to the issues involved. The issues raised in the approval proceedings were unlikely to be any more or less complex than those which would have existed had the damages claim been issued and tried. Although such claimants were children,

in a simple and straightforward case not involving serious injuries and with no real issues about liability or quantum, the court was likely to have allocated the claim to its normal track and to have been able to deal with the case on that basis, *O'Beirne v Hudson* [2010] EWCA Civ 52, [2010] 1 WLR 1717 followed. The district judge had been wrong to rule that it was not open to him to consider whether the costs should be assessed by reference to the small claims track, and the judge had been right to adopt that approach. The words of CPR 45.7(2)(d) referred in terms to the claim which (but for the compromise) would have been issued for damages in the amount at which they were eventually agreed. That was the only claim for which the small claims track might have been the "normal track", which was an obvious reference to CPR 26.6. Since the agreed damages did not exceed £1,000 for each claimant, the condition set out in CPR, r 45.7(2)(d) was not satisfied and the costs therefore fell for detailed assessment under CPR, r 44.5 (see paras 17, 37, 42–43 of judgment). For the fees of counsel for attending an approval hearing to be recoverable, there had to be some complexity in the case which justified his being instructed to appear. Such cases did not generally involve difficult issues and could be dealt with shortly on the basis of the written advice on the merits; the convenience of having counsel attend the hearing had, therefore, to be borne by the solicitors as part of their costs (paras 54–56).

Solicitor and Client Costs

Cawdery Kaye Fireman & Taylor* (*a firm*) *v Gary Minkin [2012] EWCA Civ 546, CA* (*Civ Div*) (*Ward LJ, Stanley Burnton LJ, Elias LJ, Master Hurst* (*Senior Costs Judge*)) *1 May 2012

Summary: When assessing a solicitor's bill of costs, the costs judge had erred in ruling that the solicitor was not entitled to any of its fees on the basis that it had wrongly terminated the retainer with the client before litigation had come to an end. The retainer had been suspended due to the client refusing to pay and the client had no reasonable justification for refusing to pay.

Facts: The appellant firm of solicitors appealed against a decision of a costs judge that it had wrongly terminated a retainer with the respondent before litigation had come to an end and was therefore not entitled to any fees. The solicitors had instructed by the client to represent him on an application by his wife for an order excluding him from the marital home. The solicitors gave a costs estimate to the client. The first bill exceeded the estimate and the client complained. The bill remained unpaid and the solicitors refused to carry out any further work without payment. On assessment, the costs judge held that the solicitors were in breach of the retainer in refusing to do any more work as, under clause 6 of the standard business terms, the client had reasonable justification for not paying as the bill had exceeded the estimate. Consequently the solicitors were not entitled to any fees. The decision was upheld on appeal to the High Court. There was an appeal by the solicitors to the Court of Appeal.

Held: (1) The vital question was whether the solicitors had suspended the retainer or whether they had wrongly terminated their engagement. Suspension and termination were different concepts. The solicitors had not terminated their services but had suspended them until the client had provided payment for the outstanding fees. The judge was wrong to hold that the language used by the solicitors was redolent of termination and not suspension. The message from the solicitors was that they would do no more work until paid, not that they would do not more work at all and the continuing correspondence showed that the parties had not proceeded on the basis that the retainer was terminated. On the evidence, the client had no reasonable justification for not paying the bill and the solicitors were entitled to, and had, suspended the operation of the retainer pending receipt of money on account of costs incurred. The retainer was terminated by the client when he informed the solicitors he had lost confidence in them. The solicitors accepted the termination and promptly applied to come off the record. Accordingly, the client's termination of the retainer absolved the solicitors from any further performance of the contract but did not absolve the client from paying the costs properly incurred to that date.

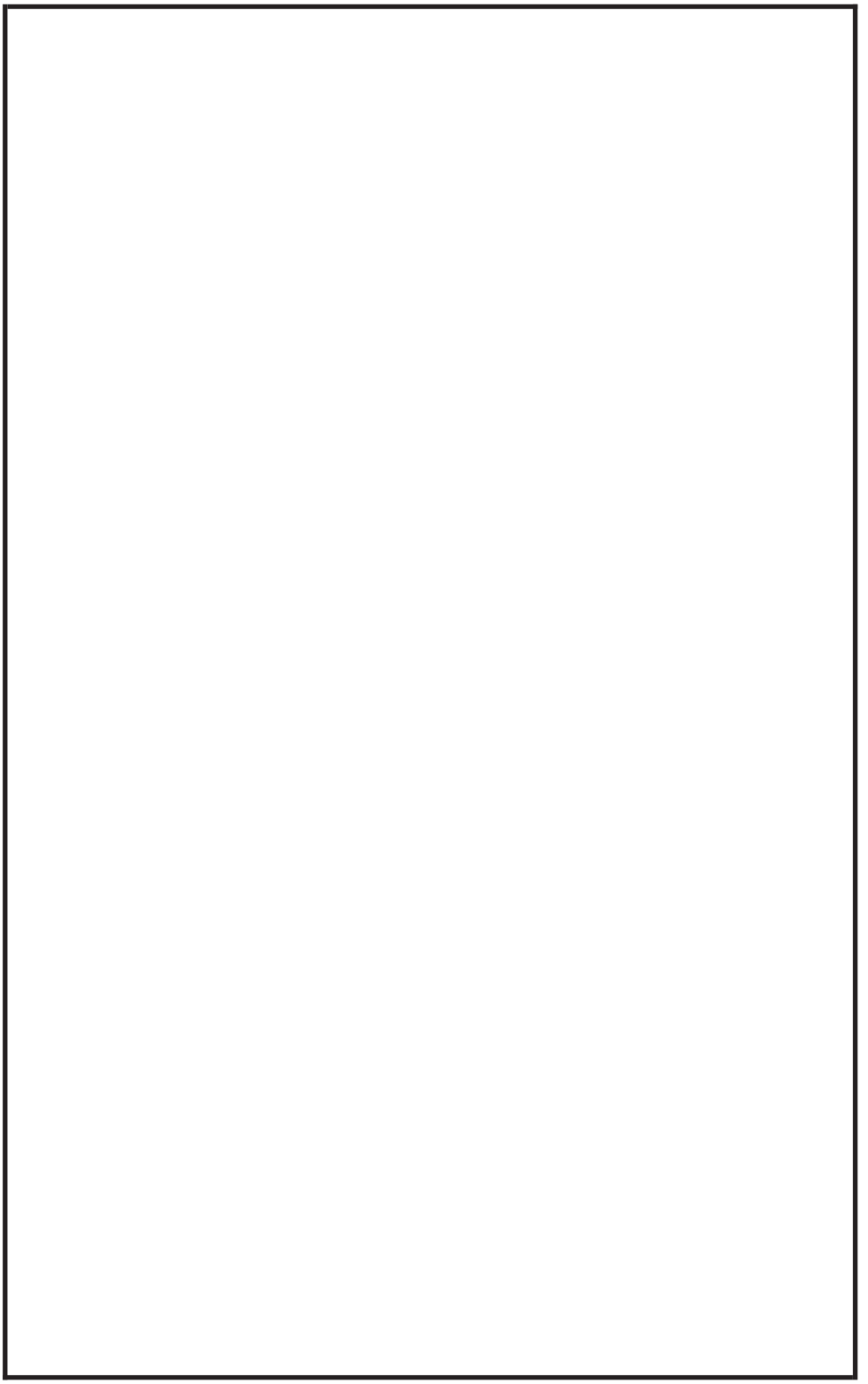
Comment: An unusual example of the Court of Appeal overturning a decision made at first instance and on appeal on the grounds that both of the courts below had misinterpreted the facts. The case may be taken by some as a further watering down of the importance of solicitor and client costs estimates.

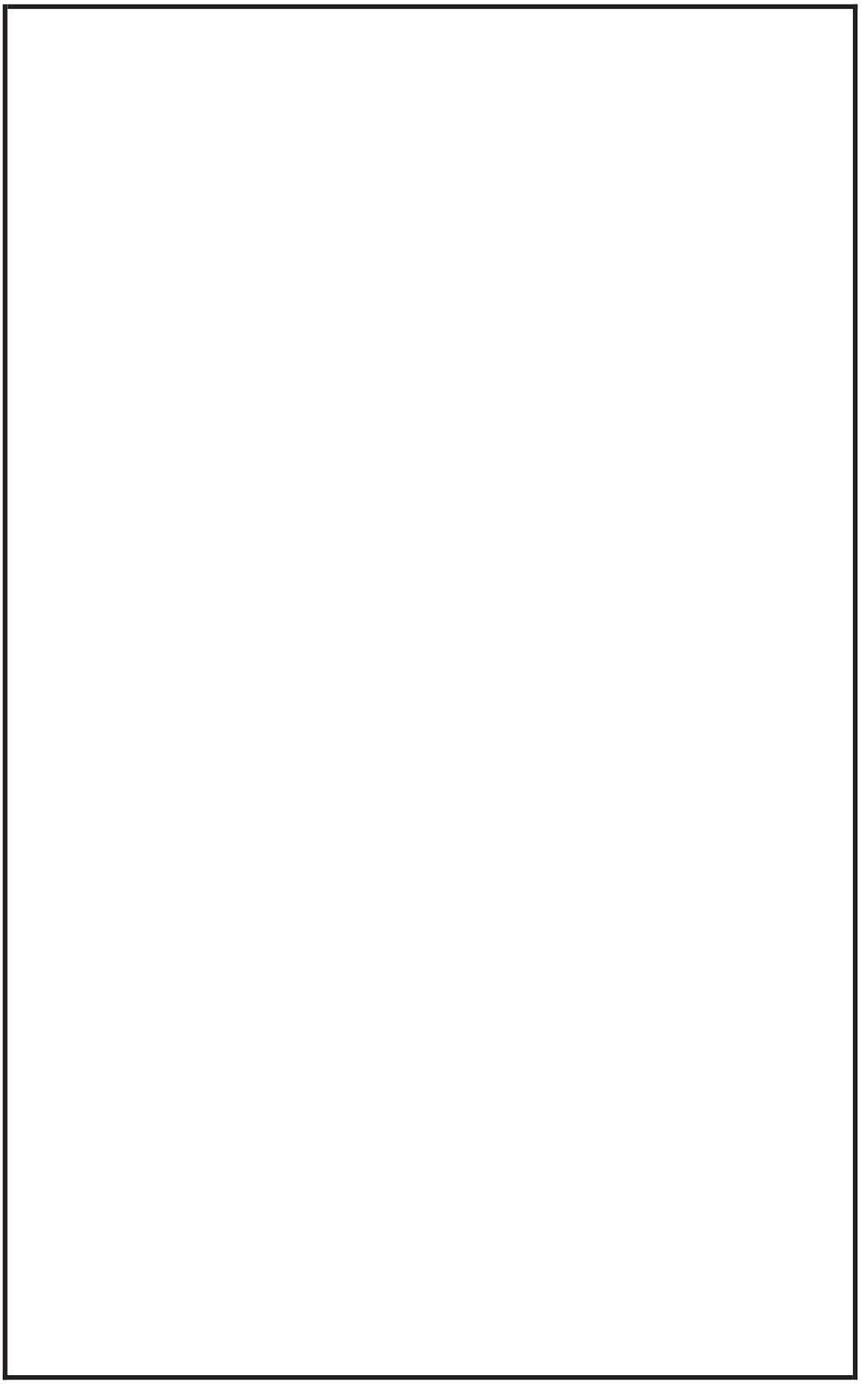
Family

Sheila Ezair v Jacob Ezair (*2012*), *CA* (*Civ Div*) (*Thorpe LJ, Rimer LJ, Black LJ*) *31 May 2012*

Facts: The appellant husband appealed against the final order in ancillary relief proceedings brought by the respondent wife on the grounds that the judge had inflated a lump sum award to compensate the wife for having incurred overinflated costs by reason of the husband's conduct.

Held: The judge had fallen into error in quantifying the lump sum as he had. He had undoubtedly been fully entitled to have had regard to the wife's strong submissions that the husband's conduct in the case had inflated her legal costs. It was open to the judge, under the Family Procedure Rules 2010, r 28.3, to have concluded that the instant case was not one that fitted comfortably within the general rule that there should be no order for costs at the conclusion of an ancillary relief trial and to have penalised the husband by making an order for costs so as to compensate the wife for that element of wasted costs. It was, however, unorthodox simply to inflate a lump sum in the way that he had. The safe and orthodox procedure was to assess the lump sum in accordance with the criteria under the Matrimonial Causes Act 1973, s 25 and then to make a distinct costs order.





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