Butterworths Costs Service Bulletin

Bulletin Editor
Nicholas Bacon
Head of the Costs Team at 4 New Square, Lincoln's Inn, London
With contributions from George McDonald, Barrister

INTRODUCTION

We have reported on the most significant updates from 15 May 2013 to 15 August 2013. We address below a number of further developments and proposed developments of the Jackson reforms, and some recent cases in relation to those reforms.

Proposed further developments/consultations

First, the proposed developments to the Jackson reforms.

In our previous Bulletin in February 2013 we identified the limited application of the new Costs Management provisions in the Chancery Division and Technology and Construction Court and Mercantile Courts (in addition to the Admiralty and Commercial Courts).

Now, the Civil Procedure Rules Committee has set up a sub-committee to advise upon: *"a) the desirability of retaining the Admiralty and Commercial Courts' blanket exception to the mandatory requirement to produce costs budgets at CPR Part 3.12(1) b) the current value-based exception for the TCC, the Chancery Division and the Mercantile Courts and c) whether or to what extent Part 8 claims (including Judicial Review) should be excluded from the mandatory costs budgeting regime."*

The sub-committee *"will also consider whether any other claims currently within the mandatory costs budgeting regime should be exempted. The aim is to produce a new definitive rule for inclusion in the CPR to replace the existing rule 3.12(1) with its reference to exemptions from mandatory costs budgeting as defined in the directions made by the President of the Queen's Bench Division and the Chancellor of the High Court."*

The sub-committee anticipates, after it has been through the consultation process (which is currently ongoing), to report to the Civil Procedure Rules Committee at the first meeting of the new legal year in early October 2013. Interestingly, the sub-committee recognises that the last minute changes to CPR r 3.12 were made in haste, and has already indicated its preliminary view, as follows:

> "The preliminary view of the majority of the sub-committee is that the Admiralty and Commercial Courts' blanket exception at r.3.12 may be unnecessary and inappropriate. The costs management regime is an important new tool in the attempts to keep the costs of civil litigation within reasonable bounds. The obligation to produce costs budgets (subject to the court's discretion to direct otherwise) is an important part of that regime and there is no obvious reason why it should not apply to all specialist civil courts …
>
> Of course, even without the blanket exception, if the court concluded that a case should not, for particular reasons, be the subject of the costs management regime, then the individual case can be excepted under the existing rules. Early written applications could be made to court for a direction to exempt the case from the need to produce a costs budget and from the costs management regime, by reason of the specific features of a particular case or if the parties agreed this. That may be a further reason why the blanket exception is inappropriate."

The sub-committee recognised that their preliminary view was just that, and considered that *"of particular interest would be the effect on the willingness of commercial organizations in international transactions to agree upon the jurisdiction of the Courts of England and Wales."*

The sub-committee will also consider:

1. if there should be qualified exceptions, and how those exceptions will be defined;
2. if any unforeseen difficulties in relation to the existing mandatory costs budgeting and costs management regime have arisen;
3. the position for Pt 8 claims. At present, costs budgeting applies in Pt 8 claims only if a CMC is ordered, which is "*rather indirect and non-transparent*". The sub-committee's preliminary view is that "*whilst costs management orders have a particular benefit to longer cases, they are of much less relevance to the short form procedure envisaged in Pt 8 and in Judicial Review*". As such, Pt 8 and Judicial Review proceedings may become exempt, although it would be open to the court to order that the costs management regime applies.

Secondly, the Ministry of Justice has commenced a consultation process "*on proposals to speed up the settlement of mesothelioma claims in England and Wales*", which runs from 24 July 2013 until 2 October 2013 (see https://consult.justice.gov.uk/digital-communications/mesothelioma-claims). The MoJ makes the following proposals:

1. the introduction of a dedicated pre-action protocol for mesthelioma (MPAP). They are also seeking *"views on the insurance industry's plan to set up a secure electronic information gateway to support quicker and more transparent information gathering and management in all mesothelioma claims …"*

2. *"Alongside these proposals, to reflect the lower underlying legal costs which we expect as a result, we are also consulting on the principle and structure of setting constraints, in the form of Fixed Recoverable Costs* (*FRCs*)*, on the legal fees which successful claimants may recover from the defendants under the new standard stages of the MPAP"*; and

3. the likely impact on mesothelioma claims of the conditional fee agreement reforms which came into effect on 1 April 2013 if those provisions are now commenced for these types of case. Mesothelioma cases are currently exempt from the recent reforms.

New developments now in force

Now, some further developments which have already come into force.

The Civil Procedure (Amendment No. 6) Rules 2013 were laid before Parliament on 10 July 2013 and came into effect on 31 July 2013. These provide, in summary, that:

1. the Low Value Personal Injury Scheme for Road Traffic Accidents is extended to include claims valued at £10,000 to £25,000;

2. the above scheme is also extended to include most personal injury claims with a value of £1,000 to £25,000, as set out in the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims;

3. a new fixed costs scheme for claims which exit the protocol schemes and either settle or proceed to issue of a claim and judgment, which includes defendants' costs in those cases where the fixed costs regime would otherwise apply, and the costs recoverable by both parties in related interim applications;

4. the amendments to Pts 36 and 45 apply only to claims started under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents where the Claim Notification Form is sent in accordance with that Protocol on or after 31 July 2013 (the previous Protocol shall continue to have effect for earlier claims); and

5. there are new rules which provide for claimants' fixed costs in ss III and IIIA of Pt 45 of the CPR where the claimant either accepts or fails to beat a defendant's offer to settle made under Pt 36. There are also new rules with regard to defendants' costs in comparable circumstances.

There have been some extremely important decisions on costs budgeting in this period, and we now address those and other important cases.

DIVISION A – CIVIL LITIGATION COSTS

COSTS BUDGETS

ELVANITE FULL CIRCLE LTD v AMEC EARTH & ENVIRONMENTAL (UK) LTD [2013] EWHC 1643 (TCC) (Coulson J) 14 June 2013

Facts: on 29 March 2012 the court made a Costs Management Order under the Costs Management in Mercantile Courts and Technology and Construction Courts – Pilot Scheme ("PD 51G"). and approved the Claimant and Defendant's costs budgets (enlarged slightly at a Pre-Trial Review on 18 January 2013). On 7 February 2013 the Defendant filed and served a revised budget (revised from £264,708 to £531,946.18). On 22 February 2013 the Claimant objected to the Defendant's revised budget, and served their own revised budget (revised from £212,533.25 in respect of costs and £104,800 for the ATE premium to a total of £372,179.53). Neither side formally applied to revise their costs budgets either prior to the trial which commenced on 4 March 2013, or the judgment handed down on 24 May 2013. The Defendant successfully defended the claim, and at the hearing on 4 June 2013 the Defendant sought:

- its costs of the claim on the indemnity basis. The court did not consider the circumstances of the case justified an award of indemnity costs, which it not addressed further here (save insofar as the same is relevant to costs management); and
- the court's approval of its revised budget.

Held: dismissing the application: (1) the Defendant maintained that, had it been awarded costs on the indemnity basis, the approved costs budgets became irrelevant as para 8 of PD 51G only refers to assessments on the standard basis. Coulson J held (*obiter*) that for PD 51 G and CPR r 3.18, as a matter of logical analysis "*the costs management order should also be the starting point of an assessment of costs on an indemnity basis, even if the 'good reasons' to depart from it are likely to be more numerous and extensive if the indemnity basis is applied";* (2) If the Defendant wanted the court to approve the significant changes to its costs budget then it had formally to seek approval from the court (as opposed to simply filing and serving in February 2013); (3) An application to revise a costs management order ought to be made immediately it becomes apparent that the original costs budget has been exceeded by more than a minimal amount (in the present case, in January/February 2013). The application pursuant to para 6 of PD 51G ought to have been made before trial (and could not be made after trial), in accordance with the specific wording of para 6; (4) Even though para 6 of PD 51G does not specifically require a party to demonstrate a "good reason" for the increase (c.f. para 8), Coulson J held, albeit *obiter*, that the test under para 6 of PD 51G is the same as that in para 8: ie the court should not approve a revised budget unless satisfied in all the circumstances that there is good reason for the revision; (5) (*obiter*) there was not a good reason to depart from the budget (save in respect of one reasonably unanticipated

element of expert evidence) on the specific facts. Coulson J made the following general comments (i) the claim progressed as it was expected to (the issues raised in the initial pleadings were pursued to trial). As such, the general scope for alleging that there was good reason to depart for the costs management order was relatively limited; (ii) he reiterated his analysis in *Murray v Neil Dowlman Associates* [2013] EWHC 872 (TCC) that it was doubtful whether the mere making of a mistake in an approved costs budget could, of itself, amount to a good reason for a later departure; (iii) the Defendant maintained that the Claimant would not suffer any prejudice. He stated that prejudice is likely to be much less relevant than before. In any event, the Claimant had been prejudiced due to the limited extent of its ATE cover; and (iv) costs budgets have to be prepared on the basis that all the pleaded issues are in dispute (rather than making any assumptions that the issues will be narrowed). In the absence of any qualification in the costs budget, the court is entitled to assume the comprehensive nature of the figures included.

Comment: there are a number of important elements of this judgment which, although a decision under PD51G, applies to CPR r 3.15–3.18. It is a must read for any party seeking to revise its costs budget. Of particular importance is the guidance that parties should apply as promptly as possible for a revision (and not after trial), parties should include all assumptions within the costs budget, and what constitutes (or does not constitute) good reasons to depart from a costs budget.

ANDREW MITCHELL MP v NEWS GROUP NEWSPAPERS LIMITED [2013] EWHC 2179 (QB) and EWHC 2355 (QB) Master McCloud 18 June 2013 and 1 August 2013

Facts: in this high profile case, the Claimant had failed to engage in discussions of budget assumptions when asked (per para 4.1 of PD51D), and had only filed its budget one day in advance of the relevant CMC (as opposed to seven days before as per para 4.2 of PD51D). On 18 June 2013 the court imposed the sanction that the Claimant was limited to a budget consisting of the applicable court fees for his claim. The court had regard to the new CPR r.3.14 which specifies that sanction (but which was not applicable under PD52D, which did not provide a sanction). The Claimant applied for a variation of that order and/or for relief from sanctions. The Claimant accepted that the court had jurisdiction to impose the sanction, but maintained that: (1) in being guided by the sanction in CPR r.3.14 the court had misdirected itself – CPR r.3.14 only applied when a party had entirely failed to file a budget, as opposed to filing a budget late; (2) further, the court should not have applied CPR r.3.14 by analogy (and relied on *F&C Alternative Investment* (*Holdings*) *Ltd v Barthelmy and Anor*. [2012] EWCA Civ 843); and (3) the Claimant was not obliged to appeal the court's earlier decision imposing the sanction.

Held: dismissing the application, that: (1) CPR r.3.14 did apply to budgets filed late as well as budgets not filed at all; (2) the court was entitled to apply CPR r.3.14 by analogy when considering appropriate sanctions (F&C was

distinguished); and (3) it would not be correct to re-consider the previous order in any event. Master McCloud gave permission to appeal, so we await the outcome of the appeal (if pursued).

Comment: these two linked decisions demonstrate how important it is not only to file a budget, but to file the budget on time and to comply with the other costs management provisions. If this decision is not overturned on appeal then, although dependent on the case-specific circumstances, any delay or failure to comply could have the draconian consequences prescribed by CPR r 3.14 (and applications for relief from sanction for short delays may not be successful). If appealed, then the appeal court has an excellent opportunity to uphold the new "stricter" regime.

PART 36 OFFERS

HAMMERSMATCH PROPERTIES (WELWYN) LIMITED v (1) SAINT-GOBAIN CERAMICS AND PLASTICS LIMITED; (2) SAINT-GOBAIN ABRASIVES INC [2013] EWHC 2227 (TCC)
Mr Justice Ramsey 24 July 2013

Facts: the Claimant landlord sought damages for dilapidations from the Defendant tenant on termination of a lease. The total sum recovered by the Claimant was £1,058,768. The Defendant had made a Pt 36 offer in the sum of £1m. Taking interest into account, the Claimant only exceeded the Pt 36 offer by £3,637. The Defendant maintained that, amongst other factors (which are not addressed here as they are case-specific), the court should take account of the Pt 36 offer. Although the automatic costs rules under Pt 36 did not apply, the reality is that the Claimant, by rejecting the offer and pressing ahead without any realistic counter-offer, is no better off than it would have been if it accepted the offer and the proceedings were wholly disproportionate and a waste of time and resources.

Held: awarding the Claimant 80% of its costs (the 20% reduction is not addressed here), in respect of the Pt 36 offer: (1) Where a claimant has only received a very small amount more than the sum offered by way of Pt 36, the court should not approach CPR r 44.2(4)(c) on the basis that this could lead to an order that a claimant should pay the defendant's costs. To do so would be to seek to use the provisions of CPR r 44.2(4)(c) to give a similar effect to a Pt 36 offer and thereby introduce the same uncertainty into Pt 36 offers which are near to but below the sum awarded, as led to the criticism of *Carver v BAA Plc* [2008] EWCA Civ 412 and the subsequent amendment introduced in CPR r 36.14(1A); (2) the principle in sub-para 72(vii) of *Multiplex Construction (UK) v Cleveland Bridge UK* [2008] EWHC 2280 (TCC), derived from Carver, that it may be appropriate to penalise a party in "near miss cases", is no longer a principle which applies to Pt 36 and should not be applied as a special "near miss" rule through CPR r 44.2(4)(c). The court doubted that a "near miss" offer can generally add anything to what otherwise would be conduct in the form of an unreasonable refusal to negotiate.

Comment: this decision seals the fate of the Carver decision for "near miss" cases, and such offers now have little, if any, weight absent an unreasonable refusal to negotiate.

BELLWAY HOMES LIMITED v SEYMOUR (*CIVIL ENGINEERING CONTRACTORS*) *LIMITED [2013] EWHC 1890* (*TCC*) *Mr Justice Akenhead 04 July 2013*

Facts: The Defendant (and counterclaimant) made a Pt 36 offer to settle for £1 on 18 October 2012, including the return of retention moneys of £146,955. The Claimant rejected the offer and paid the Defendant the retention moneys. Shortly before trial, the parties settled all the claims on the basis that the Defendant would pay to the Claimant the sum of £146,953 with costs left to the trial judge. The Claimant argued that the Defendant should pay all its costs. The Defendant maintained that the Claimant should recover all its costs because it beat its earlier Pt 36 offer.

Held: (1) in approaching costs, the parties can not and do not expect the court in effect to decide issues that had arisen on the pleadings. However, the court is entitled to draw inferences from the background facts which are unobjectionable and from the settlement actually achieved. In the premises, the Defendant's offer was not simply a nuisance of commercial offer; (2) taking into account the Pt 36 offer, essentially what r 36.14(2) requires the court to do is what is just as between the parties. In the circumstances of the case, and just approach is that: (i) the Defendant pay 50% of the Claimant's costs up to 31 September 2012; (ii) the Claimant pay the Defendant costs from 30 September 2012 to 31 January 2013; and (iii) thereafter each party should pay its own costs; and (3) If there are difficulties created by a Pt 36 offer, it is sensible to agree that the court can be asked to resolve costs issues arising. It might in one sense be thought to be a lacuna of the CPR that there is no express provision for reference by a party to the court to permit it to accept that Pt 36 offer during the "relevant period" but with the court being left to resolve issues of costs. This might be explained by the fact that the offeree can make a "without prejudice save as to costs response" saying that it would accept what has been offered subject to the court deciding costs issues; ultimately both offers could be considered by the court after the trial. It may be that the Rules Committee might want to consider this.

Comment: the suggested "lacuna" is filled to a certain extent for the reasons identified in the *Hossein Mehjoo* case below – on an assessment, unreasonable costs will be disallowed. However, in cases involving claims and counterclaims, difficulties can still arrive. It is, however, open to the parties to make separate Pt 36 offers in respect of the claim and the counterclaim (as well as Calderbank offers). If the CPR were changed to allowed acceptance of the offer on the basis that the court can decide the costs order, this removes the advantages of certainty, and is contrary to standard contractual analysis where the acceptance most be on the same terms as the offer.

HOSSEIN MEHJOO v (1) HARBEN BARKER (A firm) (2) HARBEN BARKER LIMITED [2013] EWHC 1669 (QB)
Mr Justice Silber 14 June 2013

Facts: the Claimant's claim against the First Defendant failed, but succeeded against the Second Defendant in the sum of £1,192.546.02. The parties disputed the appropriate costs orders following judgment. The Claimant had beaten its earlier Pt 36 offer of £1,024,000, and so sought costs on the indemnity basis. The Second Defendant maintained that the Claimant should not be entitled to indemnity costs as: (1) it had not beaten its offer, taken into account the costs to be paid by the Claimant to the First Defendant (and in respect of the costs of a specific issue ordered to be paid by the Claimant); (2) the Claimant withdrew its offer after trial; (3) it would be unjust, pursuant to CPR r.36.10, for the court to order indemnity costs because the Claimant had not given details of its costs, which the Defendants' solicitors had sought; and (4) it would also be unjust for Pt 36 consequences to apply when the Claimant had changed its case after the Pt 36 offer had been made and during the lead-up to trial.

Held: in respect of the Pt 36 offer (the judgment also addresses a number of other points): (1) the Claimant had beaten the Defendant's offer on a strict reading of CPR r.36.14(1A), as the judgment was better in money terms and the other costs were not significant; (2) as there was no need for the Claimant to withdraw its offer after trial as it was no longer open for acceptance (pursuant to CPR r.36.9(5), the withdrawal cannot deprive the Claimant of the beneficial consequences of making the offer; (3) the information "*available to the parties*" as referred to in CPR r.36.14(4)(c) is the information relating to the merits of the claim and it is not information as to what costs the maker of the offer had incurred at the date of that offer. The absence of some information relating to the offeror's costs would not mean that it would be "*unjust*" to make a Pt 36 order, as the Defendant is protected by the assessment process; and (4) in all cases, there are continuously new developments, especially in the run-up to the start of the trial, and in deciding whether to accept a Pt 36 offer, a party has to assess what those developments will be, could be, or might be. New developments of the kind relied upon by the Defendants cannot mean that it would be unjust to make a Pt 36 order.

Comment: this decision confirms the court's reluctance to depart from the usual costs consequences of Pt 36 orders, and considers what factors are relevant to that decision.

GENERAL RULES ABOUT COSTS AND PAYMENTS ON ACCOUNT

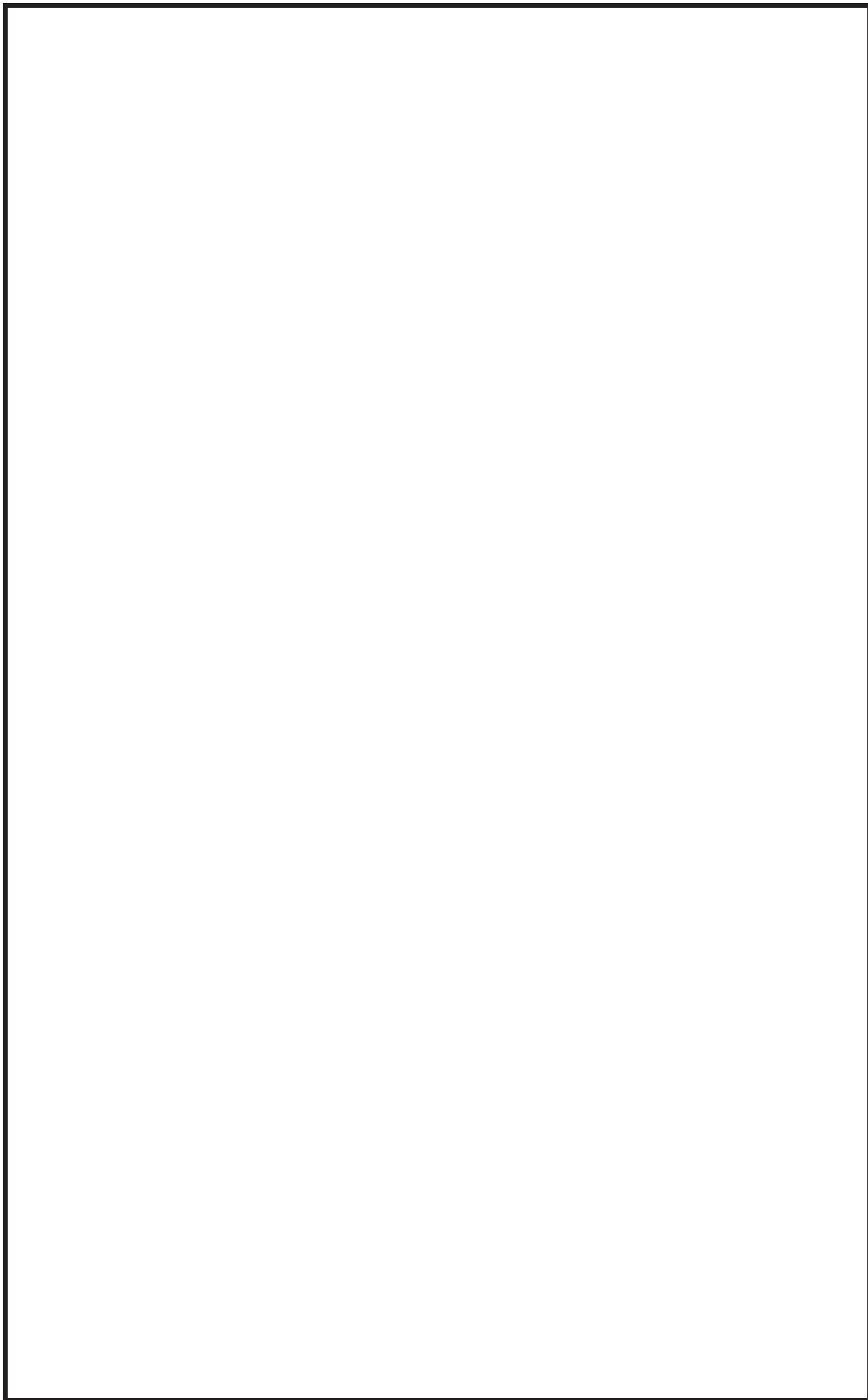
(1) CAREY VALUE ADDED S.L. (2) LONDON VALUE ADDED I LIMITED v GRUPO URVASCO S.A. [2013] EWHC 1732 (Comm)
Mr Justice Blair 24 June 2013

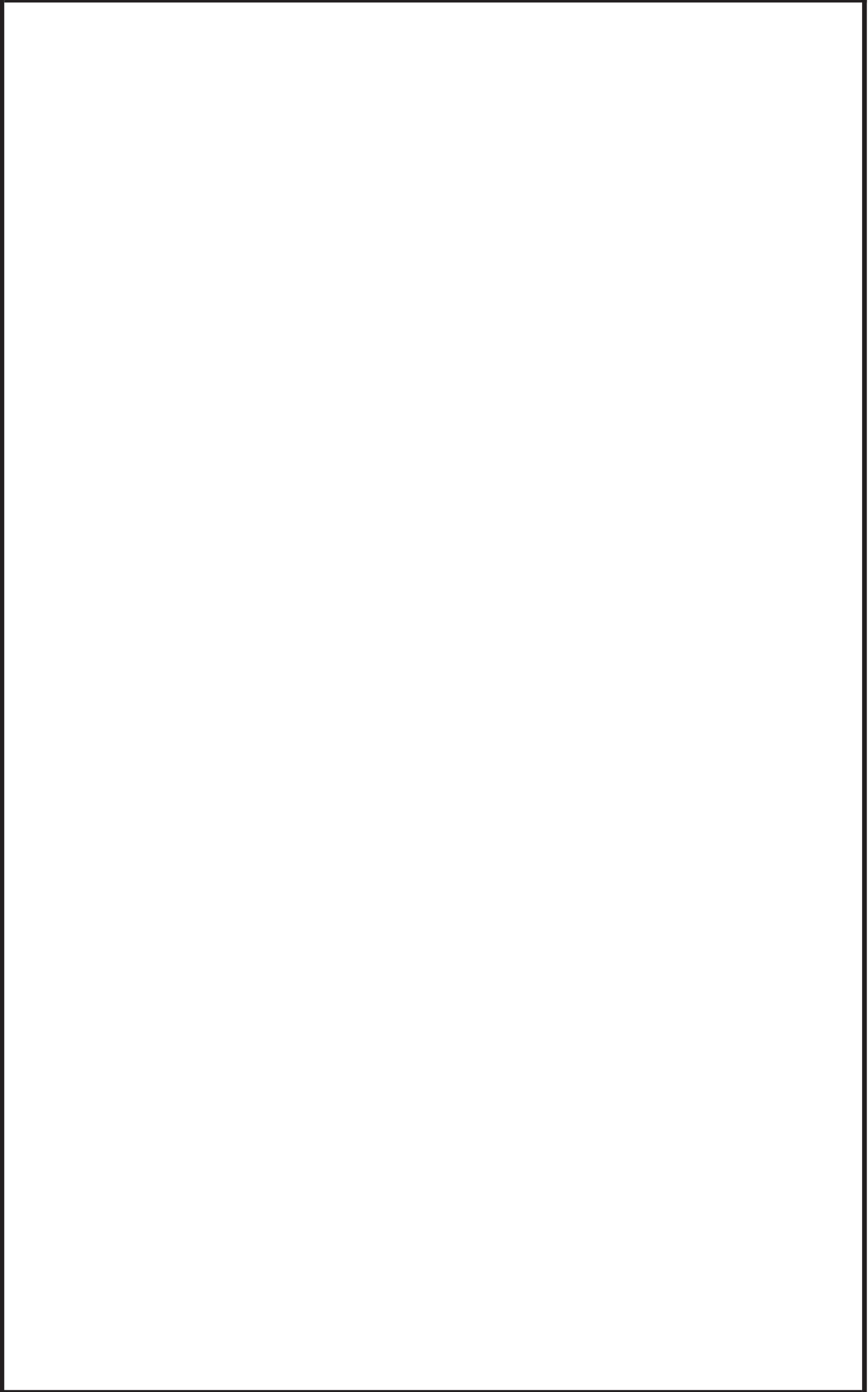
Facts: the Defendant succeeded on some issues at trial, even through the Claimant recovered damages of some €65.9m. The court determined: (1)

whether the Defendant should be entitled to recover the costs of the issues on which it was successful; (2) alternatively, whether the Claimant should only be entitled to recover a proportion of its costs; and (3) the amount the Claimant should obtain by way of interim payment. The court considered the impact of the new wording for CPR r.44.6(f) and CPR r.44.2(8).

Held: awarding the Claimant 75% of its costs and ordering an interim payment on account of costs: (1) whilst the former wording of CPR r.44.6 pushed the court towards percentage orders, the present wording is neutral. However, it remains the case that if the court is inclined to depart from the general rule and to make an order from the menu in CPR r.44.2(6), it should generally favour an order requiring payment of a percentage of costs over an issue-based order; (2) due to the various matters raised by the Defendant, there would be a reduction of 25% of the Claimant's costs; and (3) the new wording in CPR r.44.2(8) represents a subtle but important change, effectively creating a presumption in favour of an order for an interim payment, rather than it simply being normal practice as was formerly the case. As to what constitutes a "good reason" under the new CPR r.44.2(8), the underlying principle behind ordering a payment on account of costs remains as identified in *Mars UK Ltd v Tecknowledge Ltd* [1999] 2 Costs LR 44.

Comment: whilst the rules have changed, and there may be subtle differences in the wording, the status quo is effectively preserved. The same principles as before generally apply.





Correspondence about the contents of this Bulletin should be sent to Sarah Plaka, Law Group, LexisNexis, Halsbury House, 35 Chancery Lane, London WC2A 1EL (tel 0207 400 2500).

Subscription and filing enquiries should be directed to LexisNexis, Customer Services Department, 2 Addiscombe Road, Croydon, Surrey CR9 5AF (tel 020 8662 2000).

Visit Butterworths LEXIS NEXIS *direct* at www.lexisnexis.co.uk© Reed Elsevier (UK) Ltd 2012 Published by LexisNexis

ISBN 978-1-4057-7501-4