Butterworths Costs Services Bulletin

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INTRODUCTION

We have reported on the most significant updates from 10 September 2014 to 21 November 2014. While this quarter has been relatively calm compared to the frenetic pace of developments over recent years, we discuss below the future of Damages Based Agreements (DBAs) and some interesting decisions.

DAMAGES BASED AGREEMENTS

On 10 November 2014 the Civil Justice Council (CJC) published a new release which states:

CJC to look at Damages Based Agreements revisions

The Government has asked the CJC to take a detailed look at some technical revisions to the regulations for DBAs.

The commission does not extend to 'hybrid' DBAs, where additional forms of funding litigation can be coupled with a DBA to conduct a case. The Government has ruled this out as it …considers such arrangements could encourage litigation behaviour based on a low risk/high returns approach.

The CJC working group, to be chaired by Professor Rachael Mulheron of Queen Mary University London, will be looking at the following issues:

- *dividing into two sets the existing regulations with employment tribunal regulations (as per the 2010 regime) separated from regulations for civil litigation proceedings;*
- *clarifying that different forms of litigation funding cannot be used during a case when a DBA is being used to fund litigation;*

- *changing the regulations so that defendants will be able to use DBAs, by widening the application of the regulations where the party receives a specified financial benefit (rather than restricting them to receiving a payment); and*
- *clarifying that the lawyer's payment can only come from damages, and the payment should be a percentage of the sum ultimately received (not awarded or agreed); and*
- *reviewing whether the regulations should contain provisions on terminating the DBA.*

Lord Dyson, Master of the Rolls and Chairman of the CJC, said:

> *'While I am disappointed that the Government has decided not to permit hybrid DBAs, the CJC will- as ever- seek to assist and review the regulations in the areas suggested, and in the light of experience.'*

Given the limited take-up of DBAs as a means of funding litigation, it is a shame that the Government remains opposed to permitting hybrid DBAs (notwithstanding the views of Lord Dyson and Lord Justice Jackson!). This would help overcome solicitors' reluctance to enter into DBAs. That apart, the Government's request of the CJC does appear aimed at clarifying and encouraging the use of DBAs more widely.

INDEPENDENCE IN MEDICAL REPORTING AND EXPERT ACCREDITATION

The CJC has also published its (broadly supportive) response dated 1 October 2014 to the consultation on independence in medical reporting and expert accreditation. The CJC responded to each of the specific questions raised and made the following broad points:

- *'the CJC …continues to endorse the government's overall objective of developing a more streamlined procedure for soft tissue injury claims – and one which is both transparent and proportionate';*
- *'The cost of accreditation for the medical experts should be built with close regard to the level of the new fixed fees for medical reports, to ensure that a sufficient number of individuals are ready, able and available to carry out the work. The system of accreditation must not be unduly cumbersome or time-consuming for the same reasons.';*
- *'As to the new IT hub "MedCo", the CJC is firmly of the view that any such scheme should not be unduly restrictive or risk any perception of anti-competitive practice, and welcomes the government's stated aim of allowing the market to continue to evolve. It is important as well that the IT hub deals effectively with the involvement of MROs in the overall system and must accommodate those claimant solicitors who prefer …not to approach individual medical experts'; and*
- *'… while the CJC endorses the efforts to address the question of links between the claimant lawyer and the expert or MRO …it believes that,*

while important, these are not limited to financial links, and that it would be equally undesirable for a selected MRO to be run by a member of the solicitor's family, for example, even if no financial benefit ensured.'

Of particular significance, the CJC has quite rightly pointed out that the ties to be severed between the solicitor and the expert to ensure independence should include non-financial matters.

CIVIL PROCEDURE RULES UPDATE

We also note that the 75th Update to the Civil Procedure Rules, which came into force on 1 October 2014, made amendments to the Practice Direction 8B (the Pre-Action Protocol for Low Value Personal Injury Claims) in RTA and Low Value Personal Injury (Employers' Liability and Public Liability) Claims, Practice Direction 16 and Parts 35, 36, and 45. The amendments provide for fixed costs in relation to medical reports obtained pursuant to, and deal with offers to settle in respect of, low value soft tissue personal injury claims (whiplash injuries) started under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents.

Part 36 is amended in respect of those claims which are started under the Protocol but which are no longer subject to it and instead are pursued in court. Part 45 is amended to detail the costs allowed for certain medical reports, and provide that no fee shall be allowed for the costs of obtaining a medical report from a medical expert who has provided treatment or is associated with an expert who has provided treatment. The amendments apply to soft tissue injury claims started under the Protocol where the Claim Notification Form is sent in accordance with the Protocol on or after 1 October 2014.

CASE LAW

We now highlight some of the most interesting, and remarkably varied, cases which have arisen during this period.

DIVIDER A – CIVIL LITIGATION COSTS

COST BUDGETS

CIP PROPERTIES (AIPT) LTD v GALLIFORD TRY INFRASTRUCTURE LTD [2014] EWHC 2546 (TCC) Coulson J, 29/10/2014

Facts: the claim for damages in respect of alleged defects in the construction of a large development against the main contractors was put in the region of £18 million. The contractor issued third party proceedings against the architects and certain sub-contractors. During the course of a review CMC, an issue arose as to the court's powers to order the filing and exchange of costs budgets in cases where the claim is worth in excess of £2 million (under the old regime) or £10 million (the new regime). The defendant invited the court to order provision of budgets, as supported by the additional parties.

The claimant opposed such an order on the basis that the court did not have power to make such an order, and any discretion to make the order was fettered.

Held: (1) the court has a discretion to order costs budgets to be filed and exchanged in cases over £2 million. Coulson J commented, obiter, that the recent amendments to the rule might lead to a different result; and (2) there is no presumption that in case falling outwith CPR r 3.12 there would be no costs budgets ordered, and no additional burden falling on the party seeking the order. The exercise of the court's discretion is unfettered. When determining an application for costs budgets, the court has to weigh up all the circumstances of the case.

Comment: this decision is likely to lead to a number of applications for costs budgets in high value litigation, particularly by defendants. Although each case may depend on the specific judge's experience of cost budgeting, Mr Justice Coulson did highlight the benefits of costs budgets generally which could indicate the court's willingness to order costs budgets on cases not otherwise covered by CPR r 3.12.

COSTS ORDERS AGAINST NON-PARTIES

EXCALIBUR VENTURES LLC v TEXAS KEYSTONE INC [2014] EWHC 3436 (*Comm*) *Christopher Clarke LJ 23/10/2014*

Facts: the claim was funded by a number of different professional funders, who became the costs defendants. The claim was dismissed and the claimant was ordered to pay indemnity costs because of the conduct of the claim. The defendant sought orders that the funders also pay the costs on the indemnity basis, and issues arose as to what proportion of the costs, if any, each of the funders should pay given the different purposes of the funds, the different stages during the litigation that each of the funders became involved and as some costs defendants were parent companies who had provided funds to a subsidiary. The 5th to 8th costs defendants argued that the Arkin cap (see *Arkin v Borchard Lines Ltd* (*Nos 2 and 3*) [2005] 1 WLR 3055) should apply so that they were limited to pay costs up to the level of their funding. An issue arose as to whether the cap should be measured by reference (a) only to the amount contributed to the claimant in respect of the claimant's costs; or (b) that amount plus the amount contributed solely to enable the claimant to give security for the defendants' costs.

Held: (1) the Arkin cap should apply, where relevant, and should include both the amounts paid in respect of costs and the amount paid as security for costs; (2) costs should be ordered on the indemnity basis against the funders, even though they had not behaved in a morally reprehensible manner or with any impropriety. The pursuit of objectively hopeless claims which required much time, labour and expense to refute is itself a ground for indemnity costs both against the litigant and his funder. In short, the funders' position should follow the fortunes of the party; (3) the funder should pay costs from the date they had begun funding, as costs ordered against a funder must to some

extent have been caused by them; and (4) there was no good reason to ignore the parent companies' roles, and those companies would be ordered to be liable for costs as non-parties.

Comment: a complex case about when, against whom, and to what extent costs orders should be made against non-parties. The decision opens the door for such applications even wider by extending the basis of assessment, increasing the level of the cap applied in Arkin, and making orders against parent companies.

DIVIDER E – LITIGATION FUNDING

RECOVERABILITY OF SUCCESS FEES

NORAH CHRISTINA LONG v (1) VALUE PROPERTIES LTD (2) OCEAN TRADE LTD [2014] EWHC 2981 (Ch) Mr Justice Barling 30/09/2014

Facts: the claimant did not serve the statement of reasons for a percentage increase or a copy of the risk assessment and the CFA (see Costs PD para 32.5(1)(c) and (d), the 'Further Information') at the commencement of detailed assessment proceedings, but a short period thereafter. The claimant applied for relief from sanction from the disallowance of the additional liability under CPR r 44.3B(1)(d). The Costs Judge refused relief from sanction. On appeal, the claimant argued that: (i) there is no rule requiring the Further Information to be served at the commencement of the detailed assessment proceedings; (ii) the appropriate sanction in the event of a breach was CPR r 44.3(B)(1)(c) not CPR r 44.3(B)(1)(d); and (iii) if there was a breach, and the more severe sanction applied, the Costs Judge ought to have found that the breach was trivial.

Held: allowing the appeal: (1) although there was no express rule, the Further Information had to be served at the commencement of the detailed assessment proceedings; (2) the applicable sanction for late service of the Further Information is the less onerous sanction in CPR r 44.3B(1)(c), as opposed CPR r 44.3B(1)(d), therefore the consequence is that the additional liability would only be disallowed for the relevant period of non-compliance; and (3) if the severe sanction applies, then the breach should be regarded as insignificant and therefore trivial, and relief from sanction should be granted.

Comment: although the result is evidently fair as it avoids the harsh sanctions imposed in CPR r 44.3B(1)(d), and is now less significant in light of the Jackson reforms, the court's interpretation of CPR r 44.3B is surprising and contrary to the approach which had been often applied.

DEFINITION OF CONDITIONAL FEE AGREEMENTS

(1) DAVID REES (2) GWYNETH REES v (1) GATELY WAREING (A firm) (2) GATELY LLP [2014] EWCA Civ 1351 (Elias LJ, McFarlane LJ, Lewison LJ) 22/10/2014

Facts: the appellants engaged the respondents to act for them in a dispute concerning payments due to them from offshore companies following the sale

and subsequent development of their land. One of the offshore companies had brought a claim against an individual in relation to the same development and instructed another firm. The respondent assisted in that litigation, but as the appellants were not parties to the litigation it did not go on the record. The respondent's retainer provided that the respondent would be entitled to recover a percentage of the moneys recovered by the appellants. The appellants maintained that the agreement was an unlawful conditional fee agreement. The judge held that the retainer did not oblige the respondents to conduct litigation and thus did not constitute a CFA for the purposes of s 58 of the Courts and Legal Services Act 1990.

Held: allowing the appeal, that: (1) the work done was not non-contentious business as they were acting as solicitors and the work was carried out for the purpose of the litigation; and (2) the respondent did provide litigation services, and therefore the agreement fell within s 58 of the Courts and Legal Services Act 1990.

Comment: this decision provides greater clarity as to what constitutes contentious business as opposed to non-contentious business and on the interpretation of s 58 of the Courts and Legal Services Act 1990.

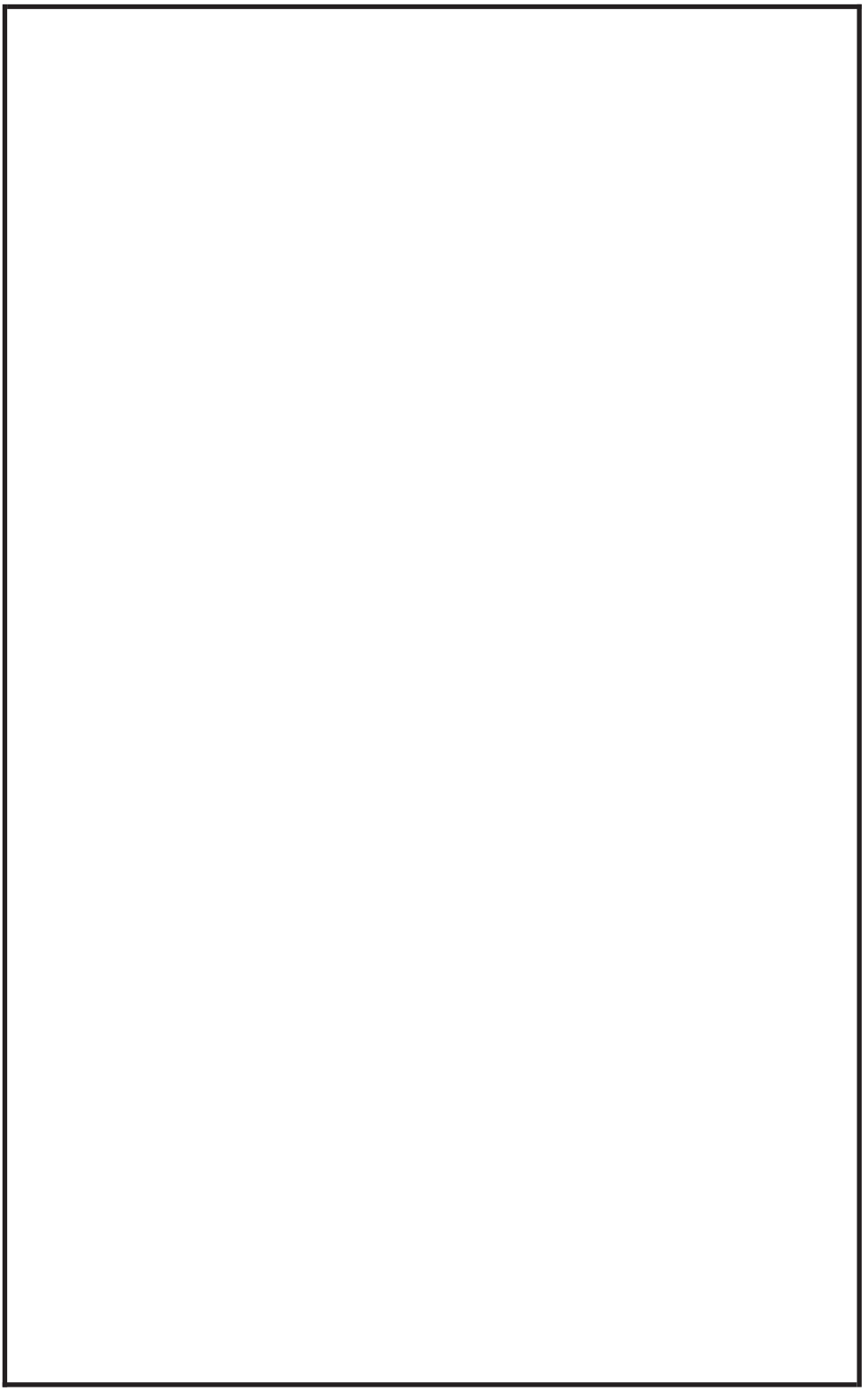
DIVIDER L – SOLICITORS' REMUNERATION

EURASIAN NATURAL RESUORCES CORPN LTD v DECHERT LLP [2014] EWHC 3389 (Ch) Mr Justice Roth 24/10/2014

Facts: the claimant sought an order that the solicitor-client assessment under the Solicitors Act 1974 should be heard in private, which was resisted by the defendant. The claimant was concerned that the disclosure of privileged and confidential material in the assessment proceedings could prejudice its interests in an investigation by the Serious Fraud Office. The defendant resisted the application to vindicate its reputation against allegations of overcharging.

Held: allowing the appeal and ordering that the detailed assessment should be conducted in private: (1) any waiver, even if implied, was limited; (2) the reading by the cost judge of the papers did not have the effect of putting them in the public domain; and (3) the hearing should be heard in private, although the judgment would be given in public.

Comment: a relatively novel point arose as to the whether Solicitors Act assessments were to be heard in public or private. Although the circumstances were unusual in this case, there may well be other cases where such an order would be attractive to clients.



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Published by LexisNexis

FSC
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Paper from responsible sources
FSC® C020438

ISBN 978-1-4057-8413-9

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