Butterworths Costs Services Bulletin

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INTRODUCTION

We have reported on the updates from 10 June 2014 to 20 September 2014. The hotly anticipated decision of the Master of the Rolls on Guideline Hourly Rates (GHR) has been released, and the much-maligned *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537* decision has been supplemented (or superseded, it is up for debate) by the conjoined appeals in *Denton v TH White [2014] EWCA Civ 906*. We address these two topics of fundamental importance to the legal profession, and also discuss some other interesting cases and developments over the last quarter.

GUIDELINE HOURLY RATES

The Costs Committee of the Civil Justice Council delivered its report on GHR to the Master of the Rolls at the end of May 2014, in which the committee recommended proposed new GHR. The Master of the Rolls, however, has not accepted those recommended changes (but has accepted others).

By letter dated 28 July 2014 the Master of the Rolls considered the proposed changes and stated:

> *'With the support of its expert advisors the committee expresses the unanimous view that the proposed new GHR rates are "consistent with the objective evidence-base* (*derived from all areas of practice*) *that it had at its disposal"* (*section 7.3*). *Table 1* (*section 7.4*) *shows the current GHRs by band/grade and Table 2 shows the percentage changes. It will be seen that the percentage changes range from substantial reductions* (*ranging from 10% to 36%*) *to substantial increases* (*ranging from 5% to 18%*). *The majority of the changes* (*18*) *would involve reductions; only 7 would involve increases.*

… The concerns expressed by the committee relating to the proposed new rates are that (1) the LMS survey and its own survey suffer from the "self selection" nature of the respondents who replied: they were not randomized surveys; (2) all the surveys relied on were based on the response of a very small part of the large community of civil litigation solicitors throughout England and Wales; (3) the respondents to the LMS Survey will not have engaged in a significant amount of multi-track litigation; and (4) consideration ought to be given to measures that lesson the immediate impact of the proposed changes.

The fourth concern has led the committee to recommend that the new GHRs should be phased in over two years.

My conclusions on the proposed rates

I have given careful consideration to the recommendations for the new rates, but regret that I cannot accept them. The concerns expressed by the committee lead me to conclude that the evidence on which its recommendations are based is not a sufficiently strong foundation on which to adopt the rates proposed. In my view, the first and second concerns, when taken together, are particularly compelling. A relatively small non-randomized survey cannot be a secure basis for determining what it costs solicitors to run their practices. This shortcoming in the evidence is fundamental.

… I am also conscious of the fact that, although the committee (rightly in my view) has not taken into account the impact of the Jackson cost reforms, these reforms have contributed, in the short term at least, to considerable uncertainty. In these circumstances, it is all the more important that the evidence on which any changes are based is reliable …'

The Master of the Rolls did endorse several of the other recommendations made by the Cost Committee, being:

- There should not be an additional Grade A* (section 6.3 of the report);
- Separate GHR bands specific to specialist fields of civil litigation should not be introduced (section 6.6 of the report);
- Separate rates should not be introduced for detailed assessments, but that there should be greater flexibility in detailed assessments than would ordinarily be shown in summary assessments (section 6.7 of the report);
- The criterion for Grade A fee earners should be amended so that it include Fellows of CILEX with eight years' post-qualification experience (section 6.1 of the report); and
- Costs lawyers who are suitably qualified and subject to regulation should be eligible for payment at GHR Grades C or B, depending on the complexity of the work (section 6.2).

The Master of the Rolls also rejected the recommendation to introduce a new Grade E for paralegals (section 6.4 of the report), as the committee had acknowledged that there was no comprehensive data in respect of the range of paralegal salaries or costs.

THE WAY FORWARD

The Master of the Rolls decided not to proceed with temporary inflationary increases to the hourly rates, but instead considers that '*efforts need to be made to obtain far more comprehensive evidence than it was possible for the committee to obtain …I propose, therefore, to have urgent discussions with The Law Society and the Government to see what steps can be taken to obtain evidence on which GHRs can reasonably and safely be based*'.

Comment: as the majority of the proposed changes to the GHR involved reductions, the Master of the Rolls' decision may come as welcome relief to firms who are already facing financial uncertainty in light of the Jackson reforms. However, as the Master of the Rolls identified, the current position is deeply unsatisfactorily and requires expeditious resolution. Watch this space!

RELIEF FROM SANCTIONS – AN ABOUT TURN?

The Court of Appeal heard three conjoined appeals on 16 and 17 June 2014 in *Denton v TH White [2014] EWCA Civ 906* and have given further guidance on the test to apply on applications for relief from sanctions. Although the Court of Appeal stated that they were merely clarifying and amplifying their decision in *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537*, many commentators consider that the Court has rowed back considerably from its position in Mitchell, and certainly lower courts now will be encouraged to take a less strict approach.

The most important parts of the decision are extracted below in order to retain the precise wording used by the Court of Appeal:

'*24. We consider that the guidance given at paras 40 and 41 of Mitchell remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]"… We hope that what follows will avoid the need in future to resort to the earlier authorities.*

The first stage

25. The first stage is to identify and assess the seriousness or significance of the "failure to comply with any rule, practice direction or court order", which engages rule 3.9(1). That is what led the court in Mitchell to suggest that, in evaluating the nature of the non-compliance with the relevant rule, practice direction or court order, judges should start by asking whether the breach can properly be regarded as trivial.

26. … It seems the word "trivial" has given rise to some difficulty …In these circumstances, we think it would be preferable if in future the focus of the enquiry at the first stage should not be on whether the breach has been trivial. Rather, it should be on whether the breach has been serious or significant …We recognize that the concepts of serious and significance are not hard-edged and that there are degrees of seriousness and significance, but we hope that, assisted by the guidance given in this decision and its application in individual cases over time, courts will deal with these applications in a consistent manner.

27. The assessment of the seriousness or significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past …

28. If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages …

The second stage

29. The second stage cannot be derived from the express wording of rule 3.9(1), but it is nonetheless important particularly where the breach is serious or significant. The court should consider why the failure or default occurred: this is what the court said in Mitchell at para 41.

30. It would be inappropriate to produce an encyclopaedia of good and bad reasons for a failure to comply with rules, practice directions or court orders. Para 41 of Mitchell gives some examples, but they are no more than examples.

The third stage

31. The important misunderstanding that has occurred is that, if (i) there is a non-trivial (now serious or significant) breach and (ii) there is no good reason for the breach, the application for relief from sanctions will automatically fail. That is not so and is not what the court said in Mitchell: see para 37. Rule 3.9(1) requires that, in every case, the court will consider "all the circumstances of the case, so as to enable it to deal justly with the application". We regard this as the third stage.

32. We can see that the use of the phrase "paramount importance" in para 36 of Mitchell has encouraged the idea that the factors other than factors (a) and (b) are of little weight. On the other hand, at para 37 the court merely said that the other circumstances should be given "less weight" than the two considerations specifically mentioned. This may have given rise to some confusion which we now seek to remove. Although the two factors

may not be of paramount importance, we reassert that they are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. That is why they were singled out for mention in the rule. It is striking that factor (*a*) *is in substance included in the definition of the overriding objective in rule 1.1*(*2*) *of enabling the court to deal with cases justly; and factor* (*b*) *is included in the definition of the overriding objective in identical language at rule 1.1*(*2*)(*f*)*. If it had been intended that factors* (*a*) *and* (*b*) *were to be given no particular weight, they would not have been mentioned in rule 3.9*(*1*)*. In our view, the draftsman of rule 3.9*(*1*) *clearly intended to emphasise the particular importance of these two factors …*

34. *Factor* (*a*) *makes it clear that the court must consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation* (*or other litigation*) *efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief. Factor* (*b*) *emphasises the importance of complying with rules, practice directions and orders. This aspect received insufficient attention in the past. The court must always bear in mind the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance is no longer tolerated.*

35. *Thus, the court must, in considering all the circumstances of the case so as to enable it to deal with the application justly, give particular weight to these two important factors. In doing so, it will take account of the seriousness and significance of the breach* (*which has been assessed at the first stage*) *and any explanation* (*which has been considered at the second stage*)*. The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted.'*

Other important passages of the judgment also include the following:

- Paragraph 40 – the new culture of compliance and cooperation applies as much to litigation undertaken by litigants in person as it does to others;

- Paragraphs 41 and 43 – it is wholly inappropriate for parties to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. The court will be more ready in the future to penalise opportunism. Heavy costs sanctions should be imposed for on parties who behave unreasonably in refusing to agree extensions of time or unreasonably opposed applications for relief from sanctions. The court can, in an appropriate case, also record in its order that the opposition to the relief application was unreasonable conduct to be taken into account under CPR r 44.11 when costs are dealt with at the end of the case;

- Paragraph 43 – an order for a party to pay indemnity costs would free the winning party from the operation of CPR r 3.18 in relation to its costs budget. This accords with the decision in *Kellie v Wheatley & Lloyd Architects Ltd [2014] EWHC 2886* (*TCC*) but differs from the *obiter dicta* of Coulson J in *Elvanite Full Circle Ltd v AMEC Earth & Environment* (*UK*) *Ltd [2012] EWHC 1643* (*TCC*);
- Paragraph 44 – 'unless' orders should be reserved for situations in which they are truly required: these are usually so as to enable the litigation to proceed efficiently and at proportionate cost; and
- Paragraph 85 – Lord Justice Jackson's different (but dissenting) view in relation to the third stage: '*Rule 3.9 requires the court to consider all the circumstances of the case as well as factor* (*a*) *and factor* (*b*). *The rule does not require that factor* (*a*) *or factor* (*b*) *be given greater weight than other considerations.*'

IN OTHER NEWS

Other developments during this reporting period include:

- The CPR update in respect of whiplash claims is to come into force on 1 October 2014 in the Civil Procedure (Amendment No 6) Rules 2014. The update amends r 35.4, r 36.10A, and r 45.19 and:
  - Raises a presumption that only one expert medical report will be adduced, with costs fixed at £180 (excluding VAT);
  - Prescribes fixed fees for secondary and addendum expert reports (where justified), obtaining medical records, and answers to Part 35 questions;
  - Provides that, save in exceptional circumstances, no fee may be allowed for the cost of a medical report from an expert who has provided treatment to the Claimant, is associated with any person who has, or who proposes or recommends that they or an associate provides treatment;
  - Amends the Part 36 rules to be dependent on when the Defendant receives the fixed cost medical report; and
- Minor changes to the fees of civil proceedings have been made by the Civil Proceedings Fees (Amendment No 2) Order 2014 and the Civil Proceedings Fees (Amendment No 3) Order 2014 (amending the Civil Proceedings Fees Order 2008).

CASE LAW

DIVIDER A – CIVIL LITIGATION COSTS

QOCS

WAGENAAR v WEEKEND TRAVEL LTD tla SKI WEEKEND [2014] EWCA Civ 1105 (*Laws LJ, Floyd LJ, Vos LJ*) *31 July 2014*

Facts: the Claimant claimed damages from the Defendant for personal injuries she had sustained in a skiing accident which took place on 8 March

2007 during a package holiday. The Defendant joined the Claimant's ski instructor as a third party to the Claimant's claim. His Honour Judge Iain Hughes QC dismissed the Claimant's claim and the Defendant's claim against the third party after a lengthy trial. The Judge ordered that (a) the Claimant should pay the Defendant's costs, but that such order was not to be enforced against the Claimant pursuant to the provisions of CPR r 44.13 and r 44.14; and (b) the Defendant should pay the third party's costs, but that such an order was not to be enforced against the Defendant pursuant to the same provisions. The third party appealed the order on the basis that the Qualified One-Way Costs Shifting (QOCS) rules did not apply to the Part 20 proceedings and the Defendant appealed on the basis that the QOCS provisions were *ultra vires* section 51(3) of the Senior Courts Act 1981.

The two main issues which arose for determination on the appeal were: (1) the *vires* of the provisions relating to QOCS introduced into the CPR by rules 44.13 and 44.17 as a result of the Jackson reforms; and (2) whether QOCS applies not only to claims for damages for personal injuries brought by a claimant against a defendant, but also to claims for an indemnity or contribution brought by such a defendant against a third party, should the QOCs rules be held to be valid. The Defendant also argued that QOCS should not have retrospective effect and that the Defendant's junior counsel had a pre-commencement funding arrangement within CPR r 48.1 so the former costs rules should apply to that arrangement.

Held: dismissing the Defendant's appeal: (1) the court's full power to determine by whom and to what extent the costs of any proceedings are to be paid under section 51(3) of the Senior Courts Act 1981 is to be read subject to the power of the rules committee to make rules of court applicable to particular circumstances concerning the availability of an award of costs, the amount of such costs, and the exercise of the court's discretion in relation to costs. CPR r 44.13–44.17 concerning QOCS were rules that the rules committee was fully empowered to make; (2) the QOCS rules were, and were legitimately, retrospective, and applied to the Defendant; (3) CPR r 48.1 in respect of pre-commencement funding arrangements only disapplies the provisions of CPR Parts 43–48 'relating to funding arrangements', not relating to costs generally. The QOCS provisions do not relate to funding arrangements at all, so are not disapplied by r 48.1. Further, CPR r 44.17 does not apply as the Claimant has not entered into a pre-commencement funding arrangement.

Allowing the third party's appeal: CPR r 44.13 applies QOCS to a single claim against a defendant or defendants, which includes a claim for damages for personal injuries or the other claims specified in CPR r 44.13(1)(b) and (c), but may also include other claims brought by the same claimant within that single claim. CPR r 44.13 does not apply QOCS to the entire action in which any such claim for damages for personal injuries or the other claims specified in CPR r 44.13(1)(b) and (c) are made. Therefore the judge was wrong to hold that the QOCS regime applied to the proceedings between the Defendant and third party.

Comment: while the interesting (and far-reaching) arguments raised by the Defendant have been rejected, there are still further issues which will fall to

be considered for both QOCS and the transitional provisions in Part 48, including (i) whether QOCs should apply to a subsidiary claim for damages not including damages for personal injuries made by a claimant against another defendant in the same action as the personal injury claim; and (ii) which rules in CPR Parts 43–48 relate to pre-commencement funding arrangements and thus fall within the transitional provisions in Part 48.

PART 36 OFFERS

ELSEVIER LTD v ROBERT MUNRO [2014] EWHC 2728 (*QB*) (*Mr Justice Warby*) *31 July 2014*

Facts: after a trial, the Claimant obtained an injunction restraining the Defendant from joining another company prior to the expiry of the 12-month notice period in his contract of employment in April 2015. The Claimant sought an order for payment of an additional amount calculated by reference to the sum awarded in respect of costs pursuant to CPR r 36.14(3)(d), as it had beaten its Part 36 offer dated 9 June 2014 that the Defendant would be allowed to join the other company from 1 January 2015. The Defendant argued that: (1) the pleaded claim included a claim for damages (in the alternative) and hence sub-paragraph (d)(i) and not (d)(ii) applies, and no additional amount can be recoverable by reference to costs; and (2) it would be unjust to award the additional amount given: (a) the level of costs incurred; (b) the compressed timescale of the proceedings; and (c) the proximity of the offer to trial.

Held: declining to award an additional amount: (1) the words 'the claim' in CPR r 36.14(3)(d)(i) and (ii) means the claim in respect of which the court has given judgment which is more advantageous than the offer, not the claim as initially brought; (2) it would be unfair if, in every case where a claim for damages was brought as an alternative to a claim for an injunction, CPR r 36.14(3)(d) did not apply; (3) the level of costs claimed cannot have a bearing on the decision as to whether an additional amount should be awarded; and (4) it would be unjust to award an additional amount given: (a) it would add an additional liability for those costs incurred prior to the date of expiry of the relevant period; and (b) it would be unduly harsh to criticise the Defendant for failing to accept the offer promptly given the pace at which the proceedings were advancing.

Comment: this case again demonstrates the reluctance of judges to award the 'additional amount' in CPR r 36.14(3)(d). Indeed, whether the imposition of an additional liability on costs incurred prior to the date of the expiry of the relevant period is a sufficient reason or even relevant consideration is debatable given that the CPR clearly envisaged that would be a consequence of the rules.

THIRD PARTY COSTS ORDERS

MARLEY (*APPELLANT*) *v RAWLINGS* (*RESPONDENTS*) (*COSTS*) *[2014] UKSC [51]. On appeal from [2012] EWCA Civ 61*

JUSTICES: Lord Neuberger (President), Lord Clarke, Lord Sumption, Lord Carnwath, Lord Hodge

Facts: this appeal related to wills made by Mr and Mrs Rawlings. They each intended to make wills leaving their respective estates to the other, and, if the other had already died, to the appellant, Mr Marley. Owing to an oversight by their solicitor (the Solicitor), Mr Rawlings signed the will meant for Mrs Rawlings, and Mrs Rawlings signed the will meant for Mr Rawlings. The Supreme Court concluded that each will was nonetheless valid (see *[2014] UKSC 2*), contrary to the conclusions reached by the High Court and the Court of Appeal. As a result, the appellant inherited the estate of Mr Rawlings which was in the region of £70,000. If the will had been invalid, the respondents would have inherited the estate. The question which arose on this aspect of the appeal was how the costs of the proceedings should be borne. The appellant contended that this was ordinary hostile litigation, and the respondents should pay the appellant's costs in all three courts. The Solicitor's insurers (the Insurers) were invited to make submissions in support of the appellant's case. The respondents contend that all parties' costs should come out of the estate, or, in the alternative, should be paid by the Solicitor. The respondents' solicitors and counsel acted on a traditional basis in the High Court and the Court of Appeal, but in the Supreme Court were instructed on conditional fee agreements.

Held: in a judgment given by Lord Neuberger, the Supreme Court unanimously decided that the Insurers should pay the costs of both parties in the High Court and Court of Appeal. In relation to the costs in the Supreme Court, the Insurers should pay the appellant's costs, the respondents' solicitors' disbursements, and, the respondents' two counsels' fees, conditional on the respondents' counsel disclaiming any entitlement to their success fees under their CFA. If there had been no negligence on the part of the Solicitor, it would have been difficult to decide what order to make as between Mr Marley and the respondents. Where there is an unsuccessful challenge to the validity of a will, when the challenge is a reasonable one and based on an error which occurred in the execution of the will, the court often orders all parties' costs to come out of the estate. On the other hand, the court said that there was considerable force in Mr Marley's argument that, although these proceedings involved a reasonable dispute over the validity of a will, it was ultimately hostile litigation to which the usual rule of 'loser pays' should apply [6].This would be especially true given the small size of the estate, because an order that costs were paid out of the estate would deprive Mr Marley of any benefit from the litigation. However, this is not a case where it could possibly be right to ignore the position of the Solicitor [8]. The problem in this case arose as a result of the Solicitor's negligence, and the Insurers, on behalf of the Solicitor, had required Mr Marley to bring proceedings to seek to have the will the upheld [9]. The appellant had a clear claim in tort against the Solicitor, who would therefore be required, in the event that costs were ordered to be paid out of the estate, to reconstitute the estate [11]. As the Insurers have underwritten the liability of the Solicitor, the right order to make in relation to the costs of both parties in the High Court and the Court of Appeal, and of the appellants in the Supreme Court, would be that the Insurers pay all those costs [12–13].

Comment: this might be regarded by many as a surprising outcome. There are few cases indeed where a third party who has funded proceedings is required to pay the losers costs. But that is the effect of this judgment. It may be viewed as a yet further extension of the courts powers to make third party costs orders. The judgment is well worth a read particularly in respect of the recovery of success fees. The court disallowed the success fees of the barristers but allowed their base costs.

COSTS BUDGETS

AMERICHEM EUROPE LTD v RAKEM LTD v GEORGE WALKER TRANSPORT LTD [2014] EWHC 1881 (*TCC*) (*Mr Justice Stuart-Smith*) *13 July 2014*

Facts: the Defendant filed a costs budget in the form Precedent H which, although compliant in all other respects (save for being filed a few minutes late, regarded as trivial), was signed by someone described as a 'Costs Draftsman'. The third party argued that the Costs Draftsman was not a 'senior legal representative' as required by PD 3E and therefore the effect of the Precedent H being signed by him was a nullity.

Held: rejecting the third party's argument that the Precedent H was a nullity: (1) there is no definition of 'senior legal representative' in the Practice Direction or in the CPR and no authority could be found on the point. When considering the meaning of 'legal representative' in CPR r 2.3(1), it appears not to include a Costs Draftsman in the role he was performing; (2) even if the Costs Draftsman was a 'legal representative', he was not a 'senior' legal representative, as: (a) he appears to be the least senior of the fee earners in the budget; and (b) the intention underlying the requirement that the statement of truth be signed by a senior legal representative is that the reasonableness of the budget should be effectively certified, which the Costs Draftsman could not do where he does not have conduct of the action; however (3) the fact that the Precedent H is therefore irregular does not render it a nullity. No question of relief from sanction therefore arose, but if it did such relief would have been granted.

Comment: another sensible decision following *The Governor & Company of the Bank of Ireland v Philip Pank Partnership [2014] EWHC 284* (*TCC*) about irregularities in budgets.

SMALL CLAIMS TRACK

AKHTAR v BOLAND [2014] EWCA Civ 872 (*Lord Justice Gloster, Lord Justice Floyd, Sir Stanley Burnton*) *25 June 2014*

Facts: the Claimant claimed special damages as a result of an RTA in the sum of £6,392.80. The Defendant conceded £2,496 in respect of the sums claimed. On considering the allocation questionnaires, the court allocated the claim to the small claims track. The Claimant applied for a reallocation, and the District Judge entered judgment for £2,496 with costs, and allocated the matter to the small claims track (and ordered that the special costs rules

applying to the small claims track would not apply until service of the Defence). The Claimant unsuccessfully appealed and obtained permission for a second appeal. The Claimant argued that partial admissions did not lower the financial value of the claim or the amount in dispute. The essential question on the second appeal was described as '*what is meant by "the financial value …of the claim" in CPR r.26.8(1)(a) and "any amount not in dispute" in CPR r.26.8(2)(a)*'.

Held: dismissing the appeal, that in circumstances in which the Claimant retained judgment for £2,496, the District Judge was entitled to allocate the claim to the small claims track, since the sum remaining in dispute was less than £5,000.

Comment: the exact ambit of this decision is unclear. On the one hand it appears that defendants can admit certain parts of claims (and even make partial admissions to specific heads of loss), allow judgment to be entered, and thereby limit the costs to small claims track costs. However, as the *ratio* for the decision is that the court had already entered judgment, issues may arise as to whether the court should have entered judgment for the lesser sum as only part of the head of loss (and if claimants can resist judgment for the lesser sum in other cases thus preserving fast track costs).

DIVIDER E – LITIGATION FUNDING

COVENTRY v LAWRENCE (*No 2*) *[2014] UKSC 46* (*Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption, Lord Carnwath*) *23 July 2014*

Facts: the Claimants, the owners and occupiers of a residential bungalow brought a claim for nuisance against the nearby occupiers of a stadium and track, the Defendants, from the use of the stadium for speedway racing and other motorcar racing and the track for motorcycle racing and similar activities. The Supreme Court overturned the Court of Appeal's decision and reinstated the order of the trial Judge including that the Claimants be granted an injunction limiting the level of noise from the stadium and track and damages. The trial judge had ordered that the Defendants pay 60% of the Claimants' costs, to be subject to detail assessment. The Claimants had incurred base costs of £398,000, a success fee of around £319,000 (assumed to be 100%), and an ATE premium of about £350,000. The Defendants argued that the order for costs against them infringed Article 6 of the European Convention on Human Rights. Other non-cost related issues are not addressed here.

Held: giving further directions: (1) as the Strasbourg court took a different view in *MGN Ltd v United Kingdom* (*2011*) *53 EHRR 5* to the House of Lords, the issue of whether the Access to Justice Act 1999 costs regime, and in particular a claimant's right to recover any success fee and ATE premium from an unsuccessful defendant, infringes the Convention, is one which it is open to the Supreme Court to reconsider; (2) in light of the facts of the case and the Strasbourg court judgments of *MGN and Dombo Beheer BV v*

Netherlands (*1994*) *18 EHRR 213*, it may be that the Defendants are right in their contention that their liability for costs under the Courts and Legal Services Act 1990, as amended by Part 2 of the Access to Justice Act 1999, and in accordance with the CPR, would be inconsistent with their Convention rights; (3) however, it would be wrong for the Supreme Court to decide the point without the Government having had the opportunity to address the Court on the issue; and (4) the court therefore concluded that consideration of the Defendants' contention that the trial Judge's order that the Defendants' liability for costs extends to the success fee and the ATE insurance premium infringes their rights under Article 6 of the Convention is adjourned for further hearing after notice being given to the Attorney-General and the Secretary of State for Justice, following which the parties (including any authorised interveners) must seek to agree issues and proposed procedure, and the Court will then give directions.

Comment: in this case of potentially great importance, the Supreme Court indicates its preparedness to reconsider the compatibility of the pre-Jackson additional liability regime with the European Convention of Human Rights in light of decisions of the Strasbourg court. The anticipated further hearing will be of real interest and application to a number of extant matters.

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