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# Costs Analysis

Newsletter

Spring 2011



Deborah Burke, Costs Lawyer

Welcome to Costs Analysis, the costs digest from Deborah Burke Costing Limited.

The main purpose of this publication, which is available via email subscription, is to inform claimant and defendant fee earners alike of the latest legislation and judicial decisions which have an impact on their costs. The whole area of solicitors' costs is recognised as being complex and one in which few solicitors have received any training or obtain any form of regular update.

## STOP PRESS

Since this issue was prepared, we have had the European Court of Human Rights' judgment in the case of [MGN Limited v The United Kingdom](#). This is potentially of great significance for the inter partes recovery of success fees. For a full summary of the case and ten things that every litigator needs to know about it, please follow the link on our website or subscribe to receive e-versions of **Costs Analysis**.

## What can a third party who is responsible for a solicitor's bill challenge?

This case looks at the very interesting but often forgotten assessment process which gives a third party the right to challenge a solicitor's bill where the third party is liable to pay the same. In this particular case, the third party was a borrower which defaulted on the mortgage in question. The mortgage deed contained the common clause requiring the borrower to pay the bank's costs of enforcing its security. As the economic downturn/credit crunch, whatever you like to call it, continues, this case gives a clear summary of what the third party can and can't do if it wants to challenge solicitor's fees.

The case itself concerned a mortgage, but the same "third party" right can apply in other situations as well.

The case states the main principles which apply in these circumstances :-

First, the provisions of Section 70 of the Solicitors Act permit someone who is not the client, but is liable to pay the solicitor's bill, to have it assessed as if that someone were the party chargeable with the bill in question.

However, not all items in the solicitor's bill can be passed on to the third party. There may well be "extraneous" items in the solicitor's bill which the third party is not liable for and which remain the liability of the client. These items fall completely outside any Section 70 assessment proceedings begun by the third party.

Crucially, on the application of a third party who is liable to pay a solicitor's bill, the Court must assess the bill as if the client had requested the assessment. This means that within the assessment procedure which takes place on the indemnity basis, the third party can

only raise objections which the client would have been able to raise. CPR 48.8 highlights that on a solicitor/client assessment, costs are presumed to have been reasonably incurred if they were incurred with the express or implied approval of the client and presumed to be reasonable in amount if their amount was expressly or impliedly approved by the client. This gives a third party very little room for manoeuvre in mounting a challenge to those items which can legitimately be passed on to the third party.

*Case ref: Tim Martin Interiors Limited v Akin Gump LLP [2010] EWHC 2951 (Ch)*

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## Can a charging order be made in relation to sums not yet crystallised?

**This case confirms the position according to existing case law, that charging orders cannot be made in relation to unquantified sums. Here, the unquantified sums were costs awarded but not yet assessed and sums which were not yet the subject of a judgment or order. The case also looks at the interplay between the appointment of an administrator and the making of a charging order.**

Once again, this case involved a complex factual matrix. Within the substantive litigation, suffice it to say that a charging order absolute had been made in favour of the Respondents over a property owned by the Applicant (Monte Developments Limited) ("the Company"). During the course of the continuing litigation, the Company appointed administrators.

The administrators of the Company then applied for the charging order to be discharged. At the same time, the Respondents made various applications, in essence because they were arguing that the administrators had not got on with the process of the administration, including the sale of the property owned by the Applicant.

As a preliminary point, the Hon Mr Justice Floyd concluded that there had been no jurisdiction to make a charging order which covered either unassessed costs or sums not yet the subject of a judgment or order.

From a straight costs point of view, interest in this judgment ends here. However, the presiding judge then looked at whether or not the charging order should be set aside. The judge's examination began with a consideration of whether the Company was, in fact, solvent at the time when the charging

order had been made. If the Company had been insolvent, the Respondents would have gained an advantage over other unsecured creditors which would not be right. If the Company was not insolvent, this factor would not come into play.

The Company's financial position was considered carefully and the Hon Mr Justice Floyd concluded that it had, in fact, been insolvent at the relevant time. Having reached this conclusion, it was clear that there was a real risk that keeping the charging order in place would operate to the disadvantage of the Company's creditors as a whole. As a result, the charging order was set aside.

*Case ref: Monte Developments Limited (in administration) v (1) Court Management Consultants Limited (2) Paul Grant Jackson (3) Patricia Mary Jackson [2010] EWHC 3071 (Ch)*

## Can costs be awarded after a receivership is terminated?

**In this case, the High Court of Justice looked at the position of a receiver appointed pursuant to a confiscation order, whose appointment was subsequently terminated and whether in those circumstances, costs could be recovered for applications made after termination of the receivership.**

This long running and complicated litigation arose out of the appointment of a receiver (the Respondent) under the provisions of the Criminal Justice Act 1988 after a confiscation order had been made. The appointment of the

receiver was later terminated when the confiscation order was quashed.

In November 2010, Mr Justice Kenneth Parker had held that the Appellant had no realistic prospect of succeeding in an action he was trying to bring against his former receiver alleging breach of duty during the course of the receivership. Not surprisingly, following the dismissal of the application, the receiver, (the Respondent) applied for his costs.

The judgment given reiterates the settled position that a receiver is entitled to recover his remuneration, costs and

expenses from receivership assets.

The Appellant had argued that costs could not be awarded because the receivership had been discharged two years before the claim form was issued. Parker J confirmed that the timing of the application was irrelevant and that the receiver's costs of successfully resisting the application by the Appellant were costs of the receivership within the terms of the original appointment order. There was nothing to prevent a declaration that the costs of the failed application should be paid out of the receivership assets over which the former receiver had a lien.

*Case ref: Louis Glatt v Heath Sinclair (The Former Court Appointed Receiver) [2010] EWHC 3069 (Admin)*



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## Taking “conduct” into account

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Shouting about “conduct” is not uncommon in litigation but, much like divorce cases, it is often very hard to get conduct taken into account when costs are decided. Here, the Claimant’s approach to the litigation resulted in costs being awarded to the Defendants on the indemnity basis.

The reader of this case report is not told much about the subject matter of the patent dispute between the parties and neither, it seems from the judgment, were the Defendants until they made an application to strike out the claim or in the alternative, for the Claimant to be required to state its case clearly.

At the hearing of the Defendants’ application, the Claimant was indeed able to state its case more clearly (further information was still required but the information provided at the hearing was sufficient to prevent an immediate strike out of the claim). As a result, Mr Justice Mann was required to consider whether the Claimant should pay the costs of the Defendants’ application and if so, whether that should be on the standard or indemnity basis.

A quick reading of CPR 44.4 serves as a sufficient reminder that the two differences between the standard basis and the indemnity basis of assessment are that on the indemnity basis any doubt as to reasonableness is resolved in favour of the receiving party and that the concept of “proportionality” does not apply to costs on the indemnity basis.

In delivering judgment, Mr Justice Mann was at pains to point out that

the reason for the parties appearing before him in court was because the Claimant had previously failed to make its case clear and that the Defendants could not be blamed for taking the view that “the matter needed sorting out”. The Judge then spoke critically about the Claimant’s approach to answering the Defendants’ previous request for further information and the Claimant’s expert’s response to preliminary expert evidence relied on by the Defendants. He said that the Claimant had given “every impression of playing games” within the litigation and a similarly strong impression of not really knowing its own case and of changing its case over time.

The conclusion reached was that the conduct of the Claimant had fallen “lamentably” short of the standards required of patent litigants and that the Claimant had come close to having its claim struck out. As a result, it was right that the Claimant paid the costs of the application.

Having regard to the Claimant’s failure to disclose its case properly until the hearing of the application and its general approach to the litigation, it was also right that costs should be awarded to the Defendants on the indemnity basis.

A salutary tale indeed .....

*Case ref: Select Healthcare (UK) Limited v (1) Cromptons Healthcare Limited (2) Proto Magic Innovations Limited [2010] EWHC 3055 (Pat)*



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For those of you yet to be acquainted with Deborah Burke Costing Limited (“DBCL”), Debbie’s main role is to provide consultancy services to clients across the legal sector. She is a non-practising solicitor and a Costs Lawyer. Victoria Hopkins is a consultant and a Costs Lawyer who specialises in solicitor/client costs. The rest of the team at DBCL is dedicated to producing high quality bills of costs which enable their clients to recover the maximum costs in the minimum time and with minimum disruption to their fee earning work. DBCL specialise in providing solutions to their clients’ costs problems and all of their many clients benefit from their team’s expertise and dedication. They also offer a “Fast or Free” service ensuring clients receive a speedy turnaround.

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## What happens when you beat your own Part 36 offer?

The substantive litigation in this matter, arising out of a catastrophic road traffic accident, resulted in the Claimant succeeding at a quantum trial (having previously obtained summary judgment on liability and having successfully defeated allegations of contributory negligence). The sum awarded to the Claimant was more than the Claimant's Part 36 offer but less than the Defendant's Part 36 offer.

In relation to the Claimant's costs, the trial judge and the Court of Appeal had to apply the provisions of Part 36. Crucially, interest was not awarded on damages relating to future losses and interest was also not awarded on the Claimant's recoverable costs.

The Court of Appeal judgment is interesting to both claimant and defendant lawyers.

This case provides a useful reminder about the transitional provisions which deal with what happens when a Part 36 offer was made before Part 36 was amended on 6th April 2007 but the effect of the offer made falls to be decided after that date. The transitional provisions require, of course, Part 36 to be applied in its new form.

The relevant chronology in the litigation is as follows:-

Date	Event
7th June 2003	Road traffic accident
30th September 2005	Claimant obtains summary judgment on liability, subject to the future determination of contributory negligence.
4th December 2005	Claimant enters into a CFA which provides for a success fee of 22.5% if the action settles pre-trial and a success fee of 100% if the matter proceeds to trial. Each of these success fees includes a 10% postponement element. Success is defined as "any recovery of damages".
23rd May 2006	(Contributory negligence still a live issue) - Claimant's Part 36 offer to accept £3.4 million (or a lesser capital sum plus periodical payments).
31st May 2006	Defendant rejects Claimant's Part 36 offer.
26th/27th June 2006	Trial of contributory negligence issue. Allegations of contributory negligence are rejected.
28th May 2008	Defendant's Part 36 offer to pay £3 million plus periodical payments of £260,000.00 per year (capitalised value - £6.8 million).
24th June – 12th September 2008	Quantum trial.
10th June 2009	Judgment handed down. The Claimant was awarded £2,317,612.00 including damages in respect of future losses totalling approximately £1.2 million (the capitalised value of the settlement was approximately £6.1 million of which approximately £5 million was referable to future losses).



## What happens when you beat your own Part 36 offer? (Continued)

The parties agreed that the Claimant should pay MIB's costs from 18th June 2008 onwards ie. in effect, the costs of the quantum trial. However, the consequences of the Claimant's Part 36 offer were more difficult to understand. The trial judge ordered as follows:-

The Court of Appeal agreed that the trial judge had been right to regard himself as bound by the judgment in the McPhilemy case and could not make an award of enhanced interest unless the head of damage already attracted interest. In supporting the trial judge's

that the whole of the adverse costs claim would be met by ATE insurers.

In relation to the failure to award interest on costs, the Court of Appeal looked at the costs which the Claimant was likely to recover from the MIB which included a success fee of more than £100,000.00 and the insurance premium. The Claimant's solicitors' quantum trial costs of around £60,000.00 plus VAT and the postponement element of the success fee (almost £36,000.00) were going to be deducted from the Claimant's damages. Lord Justice Jackson referred to this type of arrangement as "grotesque" in a case where the recovery of any (our emphasis) damages triggered the "success" provisions of the CFA. In the light of the fact that the Claimant's solicitors would recover extra payments of almost £100,000.00 in excess of base profit costs and bearing in mind the fact that the paying party had made substantial payments on account of costs (more than £350,000.00), the trial judge's decision not to award interest on costs was upheld.

*Case ref: James Pankhurst v (1)  
Lee White (2) Motor Insurers Bureau  
[2010] EWCA Civ 1445*

*McPhilemy v Times Newspapers Limited  
(No.2) [2001] EWCA Civ 933; [2002]  
1 WLR 934*

- Although the Claimant's Part 36 offer had been rejected, it held its "costs potency" until the date when the Claimant ought to have accepted the Defendant's Part 36 offer, a period of two years.
- Interest was awarded at the enhanced rate of 10% on special damages and at the enhanced rate of 4% on general damages for a period of 21 months (Rule 36.14(3)(a)).
- No award of interest was made on damages referable to future losses (Rule 36.14(3)(a)).
- The Claimant was awarded costs on the indemnity basis between 13th June 2006 and 18th June 2008.
- No interest was awarded on costs (Rule 36.14(3)(c)).

Mr Justice MacDuff maintained that it was not appropriate to award interest on future losses because this head of loss did not attract any interest in the normal course of things. In relation to interest on costs, the trial judge maintained that the indemnity costs awarded and the additional interest awarded to the Claimant on special and general damages were sufficient to make the award "just and proportionate", particularly because of the existence of the Claimant's CFA.

The Claimant appealed these two aspects of the trial judge's judgment.

original decision, the Court of Appeal took into account the fact that whilst at first blush the award of an extra £17,000.00 of interest to the Claimant against the Claimant having to meet the Defendant's quantum trial costs might look unfair, the funding of the claim by way of a CFA meant that it was not, in fact, unfair. At the time of the trial, the Claimant had entered into a CFA with an insurance policy. The Defendant was liable to pay the insurance premium because it was incurred during a time for which the Defendant was responsible for the Claimant's costs and this meant





## The costs consequences of discontinuance

**Rule 38.6 of the Civil Procedure Rules provides that a discontinuing party will be liable for the costs of the opponent unless the Court orders otherwise. This case looks at the factors which the Court will take into account when deciding whether it should “order otherwise”.**

It is not that often that political parties feature in costs cases, but this case features the British National Party. The Claimants (the leader and then vice-chairman) sued various members of the party. No more of the factual background is relevant for the purposes of this article. Suffice it to say that as well as seeking assorted remedies from the Defendants in various groupings, the Claimants also applied for interim relief. The application for interim relief was dealt with on 10<sup>th</sup> April 2008 when HHJ Pelling QC made an order, by consent, restraining all of the Defendants from using a membership list to communicate with members of the party. The Claimants carried on their case after this date with a view to securing a permanent injunction to restrain the use of membership lists.

The Defendants filed defences and all denied that using the list to distribute documents constituted a breach of any legal duty. Their collective position became academic when after being declared bankrupt, the Fifth Defendant published the party's membership list on-line on 18<sup>th</sup> November 2008. With publication, the Claimants' chances of obtaining a permanent injunction disappeared. However, the proceedings continued and the case was ultimately listed for a five day trial beginning on 29<sup>th</sup> November 2010.

On 19<sup>th</sup> November 2010, an interlocutory application by the

Claimants made some months previously to include a claim for damages against the Third and Fifth Defendants was dismissed with costs against the Claimants.

Less than two weeks before the trial date, the Claimants (having recently changed solicitors) made an application for permission to discontinue with no order as to costs. In support, the Claimants cited the negating effect of the previous publication of the membership list and the fact that various chattels which had originally been part of the claim had been delivered up to the Claimants during the course of the litigation. In considering the Claimants' application, the Court had to look at the provisions of Rule 38.6 of the Civil Procedure Rules. The High Court considered the two leading authorities:-

In the *Messih* case, the Court of Appeal confirmed that the correct approach to adopt on a discontinuance is for the Court to consider whether the matters relied on by the discontinuing party supported a departure from the usual costs order. Having reviewed the facts in that case, the Court held that merely avoiding the cost and time of continued proceedings did not justify such a departure from the usual costs order, particularly when the party against whom the case was being discontinued was being deprived of its opportunity to contest the claim and to establish its defence.

In the *Walker Wingsail* case, it was a liquidator who wanted to discontinue because the claim lacked commercial purpose. The Defendant was once again being deprived of the opportunity to continue to defend the case against him.

Mr Justice David Richards divided the six Defendants in this case into two categories, those involved in the publication of the membership list/who had been made bankrupt during the course of the proceedings (the Third and Fifth Defendants) and those who had not.

In relation to the First, Second, Fourth and Sixth Defendants (who had not been involved in publication of the membership list), the Court concluded that the wrongful act of publication by another party of the membership list did not justify departing from the usual court order, not least because these Defendants were prepared to proceed to trial and if they had succeeded, they would have been entitled to costs.

So far as the Third and Fifth Defendants were concerned, the position was different. The combination of the publication of the membership list and the bankruptcy of each of the Third and Fifth Defendants did justify an order that the Claimants should not pay the costs of the Third and Fifth Defendants insofar as they were additional to those incurred in relation to the other Defendants.

This judgment represents a good example of how much the circumstances of a case must depart from the norm, before an order will be made relieving a discontinuing party of the burden of paying the costs of an opponent.

*Case ref: Nicholas John Griffin (1) Simon Darby (2) v Kenneth Smith (1) Nicholla Smith (2) Sadie Graham (3) Stephen Blake (4) Matthew Single (5) Ian Dawson (6) [2010] EWHC 3414 (Ch)*  
*Messih v McMillan Williams [2010] EWCA Civ 844*  
*Walker Wingsail Systems plc [2006] 1 WLR 2194*



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## Can the provisions of Part 36 apply to an appeal from a VAT tribunal?

The short answer to the question is, simply, “yes”.

The trader, Blue Sphere Global Ltd, had successfully resisted HMRC’s appeal from a VAT tribunal. It sought an order pursuant to CPR 36.14 for costs on the indemnity basis, enhanced interest on those costs and enhanced interest on the sums due.

HMRC resisted the trader’s claim on two grounds. First, that Part 36 could not apply to an appeal under the Tribunal Rules. Secondly, that it would be unjust within the meaning of CPR 36.14(3) to award enhanced costs

when HMRC was acting in the public interest in attempting to resist fraudulent “missing trader” claims for repayment of input tax.

Having considered Part 36 and Part 52 (statutory rights of appeal) and paragraph 20.1 of the accompanying Practice Direction, the Court of Appeal concluded that Rule 36.3(2) expressly permits an offer to be made in appeal proceedings and there was nothing to suggest that appeals from a VAT tribunal either to the High Court or to the Court of Appeal directly or from the High Court were excluded from the

application of Part 36. As a secondary point, the Court of Appeal also concluded that a successful trader who had vindicated its right to repayment of input tax should not be deprived of the positive effect of beating its own Part 36 offer.

Given that HMRC was acting in the public interest, if it wanted its particular position to be acknowledged in the rules, the rules would need to be amended to provide for the same.

*Case ref: Commissioners for HM Revenue and Customs v Blue Sphere Global Ltd [2010] EWCA Civ 1448*

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