PERSONAL INJURY COSTS 2020

A presentation

FEBRUARY 1, 2020

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Personal Injury Costs 2020

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Introduction

1. This year I want to look at personal injury costs thematically so have divided this paper into three parts:

(a) Overarching issues.

(b) Inter partes costs.

(c) Solicitor-own client costs.

The big picture

2. The year 2020 is likely to mark a watershed in the structure of the personal injury litigation industry, in England and Wales due to a package of reforms which are clearly designed to reduce the compensation bill for damages and costs, currently born by compensating parties.

3. For anyone who has been living in a cave for the last few years, the measures likely to come into force in 2020 include: the increase in the Small Claims Track limit, the introduction of tariff based awards for whiplash injuries largely rendering such awards nugatory and wider reforms to costs recovery rules, with the widespread introduction of fixed costs including an increase in the Fast Track jurisdiction to £100,000.

4. Although the full impact of such reforms will take several years to filter through, as there will be a tail of claims currently progressing through the system, by 2022 the current regime for claiming and awarding damages and costs for personal injury claims will have changed significantly.

5. So much for the headline changes, but the fundamental change consequential upon the detail of the reforms, is likely to be in the structure of the solicitor's profession (and to a lesser extent the Bar) by reason of these reforms.

6. In crude terms many solicitors' firms currently practising in this area are dependent for their income, their ability to meet their overheads and their ability to make a profit on having a basket of claims, of varying values, complexity and turn around times, in order to manage their financial risk.

7. The smaller, less valuable and shorter claims, cross subsidise the ability of a firm to undertake more involved or valuable claims, with a longer time span and hence a delay in payment. If the smaller claims are taken out of the mix, where does that leave firms who depend on them for a steady turnover of work and costs?

8. Putting matters bluntly it leaves them in trouble: and this is discernible now, in advance of 2020 by the trickle that might yet become a flood of firms either withdrawing from the personal injury market place, or sadly, sliding into administration. So, what can be done to mitigate the impacts of the reforms noted above, to thrive in the years to come, or simply to survive? I think that there are a number of matters to be considered, which I will assess against the broad headings of implications for turnover, profit and cash flow.

Turnover

9. The exit from the market of a number of firms will undoubtedly create a gap in the market, which firms will seek to fill. The key question is how: particularly as the surviving firms will all be seeking to draw from the pool of larger value cases, with consequently higher claims for costs due to the value and complexity of the work that is required to be done.

10. It may be that the rise of the ABS often threatened, usually derided as a "game changer" is finally, here by reason of the industry squeeze, as the surest way to comply with the referral fee ban, but also to engage the volume building benefits of marketing and advertising, is to have the marketing and advertising and legal practices working under one roof.

11. Consolidation of existing practices is also likely but the devil here, is in determining which firms with ostensibly healthy WIP balances, actually have valuable cases worth taking over, as opposed to headline figures which will crumble into dust when the cases are tested in the forensic fire of litigation. Moreover, there is a real question as to what areas of work to concentrate on.

12. The reforms in 2013 saw an influx of "clinical negligence specialists" whose claims to expertise were slender, but who were pivoting away from areas of work where fixed costs were introduced: in a sense a bigger reform than the abolition of recoverable success fees and ATE insurance, given that clients can still be charged success fees and QOCS mitigates the costs risks that might otherwise deter claims from being brought. It may be that instead of seeking new areas, firms will as a matter of logic seek new work from existing clients: from Court of Protection work to disability discrimination, to the more mundane areas of cross selling private client services.

Profit

13. One of the documents in the world of costs and litigation funding that everyone has heard of, but few people have actually read (largely due to the lack of a modern edition) is **The Expense of Time.** It is often forgotten that the original purpose of this document was not to construct hourly rates for the purposes of taxation or assessment, but rather to enable solicitors' firms to know the profitability of the work that they undertake.

14. What has astonished me in recent years, is the lack of analysis by solicitors acting for claimants in personal injury work, as to how much of their work is in fact profitable not only on the conventional management accounts basis, but by factoring in costs budgeting and management?

15. Much greater analysis is needed to be brought to bear on variables beyond hourly rates, to include success rates, costs budgeting and management, and relative delays in payment across types of work. Costs budgeting is really beginning to bite: in the last 6.5 years I have yet to see a case, where a "good reason" has been found to depart from a cost's management order.

16. It follows that if a solicitor is routinely writing off (or having written off) 20%-30% of time by reason of failing to manage the budget constraints with the case requirements, that needs to be the subject of scrutiny and revision as to how a firm does its work.

17. Profitability considerations in turn lead to consideration of the role of solicitor-own client charges, and how they are to be gauged in an ever-expanding world of fixed costs. Post **Herbert v HH Law [2019] EWCA Civ 527,** the client care requirements placed on solicitors and the need to provide detailed explanations to clients of their costs liabilities has come more to the fore.

18. A solicitor is entitled to charge clients 100% on their fees by way of success fee, without reference to case specific risks, but must ensure that the client is fully informed of the context. A solicitor may charge a client a risk-based success fee on costs but must put forward a realistic set of reasons to justify their assessment.

19. Or a solicitor might simply charge clients an hourly rate without a success fee and treat recoverable fixed costs as a contribution to the client's liability, having taken care to explain to the client and obtain their consent in writing of this practice. It may well be the case that a solicitor-own client

charge needs to be made to make a case profitable, not least if a solicitor is bearing the burden of financing disbursements but the danger of a client having second thoughts about their fee arrangements and seeking an assessment of costs under section 70 of the Solicitors Act 1970 is very real.

Cash flow

20. Of the three points cash flow is the most important. A firm may have a large and substantial caseload. It may have a lot of profit locked up in the cases, but if it cannot realise the value of its work on a regular and predictable basis.

21. The obvious answer is to obtain litigation funding, effectively permitting the extraction of value from the work in progress (WIP) or disbursements or both. This is not necessarily an ideal course however: many solicitors firms are already dependent on high cost overdrafts or are on their seventeenth re-financing. The release of cash comes at an erosion of profit.

22. In terms of disbursement funding, there is greater scope, due to the potential to effectively reinsure any liability for disbursements at the client's cost through ATE insurance or by asking the client to fund the disbursements through provision of a loan. Practitioners have long been aware that in the former regime of recoverable success fees, that element of the success fee, which related to the cost to a solicitor of delay in payment and/or funding the litigation was irrecoverable inter partes.

23. Accordingly, the decision reached by the Court of Appeal in the case of the **Secretary of State for the Department of Energy and Climate Change and Coal Products Limited.v.Jeffrey Jones and others [2014] EWCA Civ 363** is an interesting illustration, of the way that solicitors were able to recover an element of interest incurred pre-judgment and the making of the costs order, for their clients on disbursements. The claimants had all entered, in addition to their CFAs, disbursement funding arrangements with their solicitors.

24. These provided that the solicitor would fund disbursements as the case went along, in return for interest at 4% above rate. The interest was only payable if recovered from the paying party, and so was accurately to be described, as a contingent liability. Perhaps unsurprisingly, the Court of Appeal took the view, that the fact it was the solicitors who had funded the litigation, made no odds, as if the agreement had been made by the claimants with a bank or other commercial lender, the liability to pay the interest, was the claimants.

25. Accordingly, any firm which routinely finances on credit, the client's disbursements should review its funding arrangements to ensure that in successful cases, a useful 4.5% of interest on disbursements is recovered, from the point when the liability is incurred.

26. There are potential mechanisms in the currently extant Civil Procedure Rules which in my view are not being utilised often enough to the detriment of solicitor's firms.

27. The first and most obvious of these is the use of part 36 CPR, which remains in my view underutilised by those representing claimants. I am frequently struck by how often a case goes to trial, where there is no effective part 36 offer by the claimant. How can this be?

28. The utility of a part 36 offer, is not in the discretionary benefits which flow such as indemnity costs, the additional amount, enhanced interest etc, but the deterrent effect that it exerts on a defendant's thinking, that these things might come to pass, so that a case is settled at a far earlier stage.

29. The second of these is the ability in substantial cases, where liability is conceded for orders to be obtained for the costs of liability issues to be assessed and paid forthwith.

30. Moreover, there is now scope to argue that in such cases payments on account of quantum costs should be obtained where liability is no longer in issue and there is no part 36 offer on quantum.

31. A further lost opportunity relates to the terms and conditions of conditional fee agreements, which often do not allow solicitors to take not only disbursements and expenses from interim payments of damages made to clients, but also reasonable amounts in respect of past and future profit costs incurred.

32. But the longer term solution seems inevitable: as the key problem is the cost of capital, to provide working funds, and to invest in cases, one way of securing a "war chest" is to go to market, either through the securitisation of the work, or the flotation of the firm. This in turn will mean larger firms who have the resources, name recognition and size to make flotation on AIM a realistic option.

33. Perhaps the key detriment, is the removal of that swathe of low value claims which provide the cross subsidisation noted at the beginning of this article. I have noted in discussions with various solicitors' firms, actions they

are proposing to take to keep working in fields such as "whiplash". But why bother?

34. There is a disturbing analogy to be drawn with criminal work, where fees are set by government fiat. Is a regime of personal injury litigation subject to fixed recoverable fees set centrally so very different? For nearly 30 years we have witnessed year on year decline in criminal fees yet still good and able lawyers grub around, trying to "make it work".

35. The only long term answer may be increasing automation of such claims: the relevant department in a firm having a skeleton crew of supervisors, with apps and web portals providing "added value" to clients with low value claims, but recognising that the days of mass employment of para-legal staff processing £2000 whiplash claims have come to an end.

36. But why not dispense with low value personal injury work all together, and look for other areas of low value high turnover but where there is no "disbursement carry" such as debt collection work, low value data breach or low value financial mis-selling claims?

37. Solicitors have largely missed out on the huge number of PPI claims and subsequent **Plevin** claims, which have largely accrued to the claim's management companies, but there will be further categories of claim in the years to come. The world after all, remains full of glittering prizes for those who have stout hearts and sharp swords to take them.

Inter partes costs

Indemnity costs

38. Part 45 CPR governs recoverable costs in a vast swathe of personal injury claims and the all the indications are that the scope of fixed costs in personal injury claims is about to be expanded in the foreseeable future to include all personal injury claims with a value of up to £100,000 which can be dealt with in a trial of up to 3 days.

39. I have noticed in the personal injury claims I see how often a plea of fundamental dishonesty is raised: this could be on the basis that a claimant has lied to the medical experts (and everyone else) about the extent of their disability, or that they have put forward claims for losses which have no connection to the accident in which they sustained their injury, or that they dishonest about the circumstances of the accident. Sometimes this strays into

an allegation of fraud, where the real issue may be whether they have sustained an accident at all.

40. Despite the averments contained in the defence, which may be more or less bullish many of these cases settle. It may be because the defence was well grounded, or it may be, because the innocent claimant does not relish the prospect of an unpleasant trial with her probity at stake.

41. But in those circumstances, where a case settles with the payment of damages by a defendant without a trial, is the claimant limited to fixed costs or are they entitled to ask for standard basis or indemnity costs? If the case proceeds to trial and the claimant comes unscathed through hostile cross examination, alleging that she is a liar and a cheat, is she entitled to standard or indemnity basis costs?

42. The answer is, as it so often is: it depends. But the resolution of the issue does not depend on whether a claim is fought to trial or not, although at trial it may be easier to ground the arguments.

43. Where a claim settles under a part 36 offer the court remains seised of the issue of costs. Rule 36.14 provides so far as is material:

(5) Any stay arising under this rule will not affect the power of the court—

(a) to enforce the terms of a Part 36 offer; or

(b) to deal with any question of costs (including interest on costs) relating to the proceedings.

44. Under rule 45.29J the court has power to make the following order:

(1) If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in rules 45.29B to 45.29H.

(2) If the court considers such a claim to be appropriate, it may—

(a) summarily assess the costs; or

(b) make an order for the costs to be subject to detailed assessment.

(3) If the court does not consider the claim to be appropriate, it will make an order—

(a) if the claim is made by the claimant, for the fixed recoverable costs; or

(b) if the claim is made by the defendant, for a sum which has regard to, but which does not exceed the fixed recoverable costs,

and any permitted disbursements only.

45. It follows that when a claim settles by way of part 36 offer, a claimant can make an application to court for an order under rule 45.29J. This is important, as it is by no means the case that every case involving allegations of dishonesty will be allocated to the Multi-track. In the case of Qader v Esure [2016] EWCA Civ 1109 the Court of Appeal noted:

18. The third example, and the one which led to these appeals, arises where a claim is properly started in the RTA Protocol but is met by an allegation in the defence that the claim has been dishonestly fabricated. Sometimes the allegation is simply that the claimant slammed on the brakes to cause the accident, and the issue simply requires the cross-examination of the drivers of the two cars, easily achievable within a one day fast track trial. But some cases involve the allegation of a sophisticated conspiracy to engineer a multi-car incident, the cross examination of numerous witnesses and the deployment of sophisticated engineering expert evidence about the collision. Furthermore, the consequences for a claimant of being found to have been party to the fraudulent contriving of a road traffic accident may well include the inability to obtain vehicle insurance in the future, criminal proceedings or punishment for contempt of court. Such proceedings are therefore inherently likely to be pursued and defended on the basis that no stone is left unturned, and therefore at very substantial cost.

46. Many of the cases involving dishonesty and fraud concern claimants who have made baseless allegations in the pursuit of a claim against a hapless defendant. Thus a good example of indemnity costs being ordered where allegations of fraud were not pursued arises in the case of PJSC Aeroflot Russian Airlines v Leeds and others [2018] EWHC 1735 (Ch) where allegations of fraud were pursued up to the door of the court, before being discontinued. It was noted by Rose J as she then was:

48. The Defendants submitted that there are two bases on which the court should conclude that Aeroflot should pay costs on the indemnity basis. They first rely on the decision of David Richards J (as he then was) in Clutterbuck

and Paton v HSBC plc & others [2016] 1 Costs LR 13 ('Clutterbuck') as authority for the proposition that where a claimant proceeds with allegations of serious dishonesty and fraud against a defendant and discontinues those claims without explanation, an order for indemnity costs should usually follow.

49. In Clutterbuck, simplifying a little, proceedings had been issued against 15 defendants claiming damages in tort for deceit and/or negligence. The 11th defendant served a defence and then issued an application to strike out the claim on the grounds that the particulars of claim disclosed no reasonable grounds for bringing the claim and/or that it was an abuse of the court's process. The 11th defendant, his solicitors and counsel had prepared for the hearing of the strikeout application before David Richards J. The previous day the claimants had requested that the applications be taken out of the list. When the court refused to vacate the hearing, the claimant served on the 11th defendant notice of discontinuance of the entire proceedings. The hearing therefore proceeded as a hearing on the issue of whether the claimant should pay the 11th defendant's costs on the indemnity basis. The judge concluded that the decision had already been taken to discontinue proceedings if the attempt to take the applications out of the list failed. The judge noted that the claim in deceit had been withdrawn without explanation and without apology.

50. David Richards J stated that the general proposition in relation to cases in which allegations of fraud are made is that if they proceed to trial and if the case fails then in the ordinary course of events the claimants will be ordered to pay costs on an indemnity basis. The court of course retains a complete discretion in the matter and there may well be factors which indicate, notwithstanding the failure of the claim of fraud, that indemnity costs are not appropriate. The underlying rationale is that the seriousness of allegations of fraud are such that where they fail they should be marked with an order for indemnity costs because in effect the defendant has no choice but to come to court to defend his position. In circumstances where, instead of the matter proceeding to trial and failing, the claimant serves a notice of discontinuance, thereby abandoning the case in fraud, it is appropriate for the court to approach the question of costs in the same way. David Richards J referred to the earlier case of Jarvis plc v PriceWaterhouseCoopers [2000] 2 BCLC 368. In that case a claimant had discontinued proceedings which had alleged that the company's auditor had acted in bad faith. Lightman J held that where such an allegation was made and not substantiated, the court was amply justified in exercising its discretion to award costs on the indemnity basis. In that case, as in this, the proceedings were discontinued only at the very last moment and no reason was given.

53. In my judgment that is no basis for distinguishing Clutterbuck from the present case. On the contrary, the present case is stronger given that the allegations of fraud were pursued over eight years and the proceedings were prosecuted vigorously up to a few hours before the whole claim was abandoned the afternoon before the trial. I accept Mr Davenport's submission that it would be going too far to refer to "the rule in Clutterbuck" as Mr Tregear did. But I respectfully consider that the approach in Clutterbuck is sound. Where a claimant makes serious allegations of fraud, conspiracy and dishonesty and then abandons those allegations, thereby depriving the defendant of any opportunity to vindicate his reputation, an order for indemnity costs is likely to be the just result, unless some explanation can be given as to why the claimant has decided that the allegations are bound to fail.

47. But these considerations are not limited to the context where a fraudulent claim is pursued: similar considerations can arise where allegations of fraud are made by way of defence. In the case of Bank of Tokyo Mitsubishi UFJ Ltd and another v Baskan Gida Sanayi Ve Pazarlama AS and others [2009] EWHC 1696 (Ch) Briggs J, as he then was put the matter this way:

25. The final issue of principle is whether, in a case such as the present where allegations of the utmost gravity have been pursued wholly unsuccessfully, an award of indemnity costs depends upon a conclusion that those allegations were pursued unreasonably. In this context I was referred to three first instance cases: Three Rivers District Council v. Bank of Credit and Commerce International SA [2006] EWHC 816 (Com); National Westminster Bank Plc v. Rabobank Nederland [2007] EWHC 1742 (Com) and JP Morgan Chase Bank v. Springwell Navigation Corporation [2008]
EWHC 2848 (Com).

26. In my judgment those cases, together with the others summarised in the notes to CPR 44.4(3) on pages 1194 and following of Volume 1 of the 2009 White Book establish the following principles:

i) The court's discretion to grant indemnity costs is not limited by any hard rules of exclusion.

ii) Nonetheless the primary considerations relevant to the award of indemnity costs are first, whether the conduct of the party against whom the order is sought is such as to take the case out of the norm, and secondly, whether that party's conduct can properly be categorised as either deliberate misconduct, or conduct which is unreasonable to a serious degree.

iii) The bringing of a case alleging serious dishonesty may qualify for indemnity costs if on the material it can properly be categorised as speculative, weak, opportunistic or thin, if it is advanced on the basis of a constantly changing case, and if it is pursued on a very large scale without apology to the bitter end, including by hostile cross-examination, without constant regard to its
merits. Some combination of those factors may justify the view that the litigation has been unreasonably pursued.

27. It follows in my judgment that it is not enough for a party to assert simply that it has successfully fought allegations of the utmost gravity, regardless of the circumstances in which those allegations came to be made. Although a case in which such allegations are made may for that reason alone be out of the norm, especially a case of the present size and complexity, that is unlikely in itself to constitute a good reason for the award of indemnity costs.

28. To those conclusions on the issues of principle separating the parties I would add this. Whenever the court is asked to make some out-of-the-ordinary costs order in consequence of the alleged misconduct of the party against whom the application is made, the court must bear constantly in mind the conduct of the party making the application. I consider this to be so for two main reasons. The first is that the conduct of the party making the application may have been, in some respect, a contributory cause of the conduct complained about. It may even lead to the conclusion that the conduct complained about, although unsuccessful, was nonetheless not unreasonable in the circumstances.

29. The second reason is one of common sense and justice. Penal costs orders (like all costs orders) lead to a financial adjustment between the parties, not to penalties in the
nature of fines payable into the Consolidated Fund. Although there may be cases where the conduct criticised is such that a public example needs to be made of the
guilty party, to an extent which overrides the practical justice of the matter between the litigants before the court, they are in my judgment likely to be the exception rather
than the rule.

48. It follows that simple settlement of a case where fraud or dishonesty is alleged may not be enough to obtain indemnity costs. It may be enough to obtain standard basis costs, given that the test of exceptional circumstances under rule 45.29J, is a lower hurdle than that contemplated by the case law noted above, applicable to indemnity costs. But where the defence can be

demonstrated to be "speculative, weak, opportunistic or thin" or is accompanied by hostile cross examination to the bitter end, these factors may aggravate the situation sufficiently to justify an award of indemnity costs, whether a case concludes by settlement or at trial where the hostile cross examination fails to hit a mark.

The 95% part 36 offer

49. One of the mysteries of legal practice is the absence of effective part 36 offers on trials which take place on liability issues, particularly in the context of low value personal injury claims. Ever since the decision in **Huck v Robson[2002] EWCA Civ 398** an offer by a claimant to accept 95% of their claim has been an effective offer, which puts a defendant at risk of adverse part 36 consequences, including indemnity costs on the issue of liability, penalty interest and the 10% additional amount prescribed by the rules. Per **Huck**:

62. True it is that once a claimant has bettered his own offer, even though he may have done so by the narrowest of margins, then rule 36.21 will apply. But, as Mr Braithwaite rightly accepts, it does not follow that indemnity costs will necessarily be ordered. In every case where the rule applies, the question for the court is whether it would be unjust to make such an order. In this sense, a claimant who has bettered his Part 36 offer has a prima facie entitlement to indemnity costs.

63. At the same time, it is in my judgment implicit in rule 36.21 that, consistently with the philosophy underlying Part 36 (to which I have already referred), in order to qualify for the incentives provided by paragraphs (2) and (3) of the rule a claimant's Part 36 offer must represent at the very least a genuine and realistic attempt by the claimant to resolve the dispute by agreement. Such an offer is to be contrasted with one which creates no real opportunity for settlement but is merely a tactical step designed to secure the benefit of the incentives. That is not to say that the offer must be one which it would be unreasonable for the defendant to refuse; that would be too strict a test, and would introduce considerations of punishment and moral condemnation which (on the authority of Petrotrade and McPhilemy) are irrelevant in the context of paragraph (3) of rule 36.21. Indeed, the terms of the offer may reflect a degree of optimism and confidence on the part of the claimant/offeror. Provided only that the offer represents a genuine and realistic offer to resolve the dispute by agreement, it is for the claimant to decide at what level to pitch his offer. In some cases, an offer which allows only a small discount from 100 per cent success on the claim may be a genuine and realistic offer; in other cases, it may not. It is for the judge in

every case to consider whether, in the circumstances of that particular case, and taking into account the factors listed in paragraph (5) of rule 36.21, it would be unjust to make the order sought.

50. Despite part 36 CPR having been through substantial reforms and redrafting in the last 17 years, this approach has remained good in law. See for example the decision in **Jockey Club Racecourse Limited v Willmott Dixon Construction Limited [2016] EWHC 167 (TCC)** where the High Court judge commenting on **Huck** said:

34. Although that was not a case in which the offer reflected an outcome which was not available – in theory it was – it is a case where the offer did not reflect an outcome that was likely to result in practice. I consider that the approach taken by both Tuckey and Schiemann LJJ is one that can be applied to the present type of case. This conclusion is reinforced by a decision on costs made by Norris J in Wharton v Bancroft [2012] EWHC 91 (Ch). He said, at paragraph 22:

"All Part 36 offers are tactical in the sense that they are designed to take advantage of the incentives provided by Part 36. A low offer in a case where the offeror considers that the offeree's positioned has no merit cannot be written off as self-evidently "merely a tactical step". But the principal has no application here. The sum to be received by each of the Daughters was small. But the offer was not derisory. On the available figures (and having regard to the fact that the Daughters were conducting the litigation on a CFA with a 100% uplift and with the benefit of ATE Insurance, the premium on which was an undisclosed percentage of their costs) the real effect of the offer (although calculated as a nuisance value offer) was of the order of £200,000 (ignoring the fact that Maureen would be bearing her own costs and those of the executors). I see no reason on that ground (or taking into account the matters to which my attention is directed in CPR 36.14(4)) why it would be unjust to order costs on the indemnity basis."

35. Since the daughters were contesting the will on the grounds of undue influence by their father's long-term partner, Maureen, the offer did not reflect an available outcome of the litigation but was, as explained by Norris J, by no means derisory.

36. Miss Laney submitted that Huck v Robson can be distinguished because it was decided under the previous version of Part 36.17 which did not include the present sub-paragraph (e), which requires the court to consider whether the offer was a genuine attempt to settle the proceedings. In this, Miss Laney is correct, but I have no doubt whatever that Tuckey LJ's observations would

have been to no different effect if that provision had been included in the rule at the time because that is the very point that he addresses at paragraph 71. Jonathan Parker LJ made the point even more clearly at paragraph 63.

37. For these reasons I am persuaded by the authorities that the offer in this case was a valid offer within the meaning of Part 36 and that it was a genuine attempt to settle the claim. Whilst the discount was very modest, even in the context of a claim of some £400,000 it amounted to £20,000, which in my view cannot be described as derisory.

51. I return to the theme of this post, which is the absence of part 36 offers on liability in claims which go to trial. Why is this so? It may be that there is a reluctance on the part of lawyers to advise their clients that in a case where liability may conceivably be admitted a little further down the line, that they should give up 5% of the value of their claim.

52. It may be that a further factor causing reluctance in high value cases, is that 5%, although a modest increment of the claim in percentage terms may be worth tens or hundreds of thousands of pounds, in absolute terms.

53. Or it may be a more prosaic answer: that one of the key uses of part 36 is being neglected, in favour of quantum offers, which might bring a case to a conclusion.

54. Finally this may be, because relatively few cases, as part of a Fast Track caseload go to trial. It may not be possible to predict with precision which will attract admissions of liability.

55. A real fear may be that making part 36 offers too early, will mean giving up 5% of damages across a caseload, which will dwarf the prospect of recovering counterbalancing sums by way of indemnity costs and part 36 penalties.

56. However, anecdotal comments from those who undertake a Fast Track trial load would seem to indicate that the absence of effective liability offers at trial, is simply one aspect of a benign neglect on the part of those representing claimants on the use of part 36.

57. This would be a startling conclusion, because a key utility of part 36 is undoubtedly in respect of modestly valued personal injury claims, which would otherwise attract awards of fixed costs. It is clear law now that a claimant who beats their own part 36 offer at trial, will escape the strait jacket of fixed costs.

Quantum costs and payments on account

58. Taking up again the role of a modern day Jeremiah, or conversely, John the Baptist, depending on your point of view, about the vexed topic of the ease of funding of personal injury claims post 2020 (you can read my earlier article on the subject here: http://costsbarrister.co.uk/access-to-justice/the-oncoming-storm/) I have read with interest the recent case of RXK v Hampshire Hospitals NHS Foundation Trust [2019] EWHC 2751 (QB) which concerned an application for a payment on account of costs, in a catastrophic personal injury claim which still had some way to run before its conclusion.

59. The case concerned a decision of Master Cook, who described the application before him in these terms:

3. Following the publicity given to the decision of His Honour Judge Robinson in the County Court case of X v Hull & East Yorkshire Hospitals NHS Trust and the subsequent refusal of permission to appeal by Irwin LJ this sort of application has become common in high value clinical negligence and personal injury claims where there is likely to be substantial delay before quantum can be determined by the court. I am aware that there is no decision of the High Court on the principle of whether such applications are well founded and have an adequate juridical basis in the rules and/or authorities. I therefore indicated to the parties I would give a short written judgement in the hope that such applications would be better prepared in future.

60. The context of the application was the sort of case all too sadly familiar, in the corridors of the Queens Bench Division:

4. The Claimant suffered neurological injury as a result of a profound asphyxial insult at the time of her birth on 9 November 2013 as a result of negligent delay in her delivery. A neonatal MRI performed five days after birth showed evidence of ischaemic changes in the basal ganglia and thalami. It is the opinion of the Claimant's consultant paediatrician that she suffers from dyskinetic cerebral palsy GMFCS II, she is cognitively spared (although there is uncertainty about the extent of any learning difficulties), she has bilateral metaphyseal hip dysplasia, frequent difficult behaviour, disturbed sleep and associated dependency.

5. Proceedings were issued on 2 November 2016. Judgment was entered for damages to be assessed by way of order dated 25 July 2017, which also awarded the Claimant her liability costs to be subject of a detailed assessment if not agreed. This order also provided for interim payments on account of damages in the sum of £100,000 and of costs in the sum of £50,000.

6. The first CMC in the assessment of damages took place before me on 29 March 2019. I made orders for disclosure and for the parties to obtain reports from experts in paediatric neurology, neuropsychology and care. The primary purpose of these reports was to enable the parties and court to form a view about when it would be possible to assess damages on the basis of a settled prognosis. It is the court's experience that in the majority of such cases the Claimant will be between the ages of 12 and 22 before a final prognosis can be given.

61. As is well known there has been at least one case recently on the court's power to award costs by way of payment on account, even though the case has not been finally disposed of:

11. At paragraphs 30 and 31 of his judgment in X v Hull & East Yorkshire Hospitals NHS Trust HHJ Robinson said;

"30. In my judgment, rules 44.2(1) and 44.2(2) are wide enough to allow the Court to make an order for costs of the
kind sought by the Claimant:
(1) The discretion conferred by rule 44.2(1) relates to the questions whether costs are payable, the amount and when
the costs are to be paid.

(2) Rule 44.2(2) sets out the general rule that the unsuccessful party pays the costs of the successful party.

31. Rule 44.6(c) gives the court power to order payment of costs "from or until a certain date only".

62. The Court of Appeal refused permission to appeal from the decision of HHJ Robinson and Master Cook had no difficulty aligning himself with the reasoning in the earlier case:

12. I agree with these observations. The discretion conferred by section 51 of Senior Courts Act 1981 and expressed in CPR 44 (2) is a very wide one. As Irwin LJ commented when refusing permission to appeal the meaning of "successful party" or "unsuccessful party" cannot be confined to a binary outcome of the whole case. But it in my view it is important to realise that what HHJ Robinson actually did when allowing the appeal from DJ Batchelor was to make a costs order down to the date of the hearing of the application for an interim payment on account before the District Judge, see paragraphs 23 and 43 of his judgment. This must be right as the wording of CPR 44.2 (8) provides that the court will make an interim payment on account of costs only

where it has made a costs order which could be subject to detailed assessment. This is sometimes described as a "prospective" or "anticipatory" costs order, because it has been made before the conclusion of the proceedings, see the commentary in the White Book at 44.2.11

13. The application which should be made in these circumstances is for a costs order down to a specific date and an interim payment on account of those costs.

63. The Master then explained in his view that the criteria which governed the exercise of the jurisdiction needed to be addressed in the evidence supporting an application for a payment on account of costs:

14. Putting the matter this way makes it clear that the court will wish to take into account the factors listed in CPR 44.2 (4) and (5) and will normally expect to be presented with sufficient information to enable it to carry out that exercise. I do not consider there is a basis for asserting any kind of exceptionality test. The court will consider such applications on the basis of established principles.

64. The evidence which was put forward in support of the application was described as follows:

7. The application for a further interim payment on account of costs was supported by one paragraph in the witness statement of Ms Bean, the Claimant's solicitor;

"59. The Claimant also seeks an interim payment on account of her costs in the sum of £150,000 pursuant to the Court's discretion in CPR rule 44.2. A schedule of costs is exhibited to this statement as exhibit "AB-13 and totals £410,136.88. Interim payments of £100,000 have previously been received (£50,000 in January 2017 and £50,000 in August 2017), and therefore this payment would mean that the total interim payments on account of costs would be £250,000 (just over 60% of the total costs in the costs schedule). I submit that it is likely there will be significant delay before quantum is resolved in this matter (at least 3-4 years, but possibly much longer in uncertain future), by which time costs are likely to be significantly higher, and therefore I respectfully request that an interim payment on account of costs is made at this stage pursuant to the judge's discretion."

8. The schedule of costs exhibited to Ms Bean's witness statement was a short summary of all profit costs incurred down to the 17 June 2019. No attempt had been made to apportion the figures between liability and quantum costs.

9. It also became apparent, in answer to a question asked by me, the Claimant had the benefit of a public funding certificate and that some payments on account had been made by the Legal Services Commission.

65. The Master then went on to evaluate this evidence and decided that it was inadequate:

15. A relevant consideration will be to preserve security for a Defendant and to ensure that there is a limited risk of such costs having to be repaid although I accept, as did
HHJ Robinson, that a defendant who has overpaid costs to a claimant's solicitor may seek to set off such costs against damages. Without being prescriptive relevant considerations may include:

i) the type of funding agreement and details of any payments made under that agreement,

ii) whether any Part 36 or other admissible offer has been made, and if so, full details of the offer,

iii) details of any payments on account of damages made to date,

iv) a realistic valuation of the likely damages to be awarded at trial,

v) a realistic estimate of the quantum costs incurred to the date of the application,

vi) any other factor relevant to the final incidence of costs, such as the possibility of an issue-based costs order, arguments over rates or relevant conduct.

vii) the likely date of trial or trial window.

16. It is clear that Ms Bean's witness statement failed to adequately address any of the above issues and amounted to no more than a cri de coeur for more money. The need for solicitors engaged in heavy and protracted litigation to expect adequate cash flow is now well understood and enshrined in the rules, see the note at 44.2.12 of the White Book. The parties may serve

one further witness statement each and apply to re-list the application for hearing before me. I hope that those who make such applications in future will ensure that all relevant material is put before the court in support of the application.

66. So the application was adjourned, with leave to put in further evidence. Through this decision it cannot be said that the Master has addumbrated new principles of law, or done other than follow the prevailing orthodoxy that costs orders can be made down to a certain date, and then payments on account made in respect of the costs caught by such orders.

67. The significance of such an order is clear: the party at fault can be made to fund the further tranche of litigation brought against it, through a pre-emptive order even though a quantum trial might be years away. Moreover as the Master noted, his is a decision of the High Court, and so has binding force upon inferior courts: though I am not sure that many Circuit Judges necessarily believe that to be the case.

68. One can anticipate further refinements of principle, in particular where a defendant with judgment on liability against them, will seek to make a robust and early part 36 offer. In such circumstances I anticipate that the same approach as adopted in **Eeles** may be pressed into service, suitably tweaked, requiring the court to make some sweeping assessments.

69. However this is a familiar problem: how to grant timely relief to an injured person, whilst avoiding complications of over compensation, clawback or set off, some way further down the line.

70. The jurisdiction grounded in part 44 CPR is not confined to catastrophic personal injury cases. It follows that in other contexts where there is going to be a gap between the resolution of liability and quantum that such applications can be made. When one considers how lengthy can be the delays in big ticket commercial litigation as massive trials are worked on, the question may well be whether delay of more than one year is a pre-requisite for making such an order or some greater period of time.

Proportionality

71. Last year the long outstanding clinical negligence ATE appeals in the Court of Appeal painfully limped over the line, with judgment being handed down in the conjoined appeals of West v Stockport NHS Foundation Trust and Demouilpied v Stockport NHS Foundation Trust [2019] EWCA Civ 1220.

72. Unsurprisingly the Court of Appeal channeled the spirit of **Rogers** to reach a conclusion that can be simply described as being that block rated ATE premiums "cost what they cost" and absent a determined challenge from a defendant backed with an expert underwriting report, will be allowed as claimed.

73. As the number of underwriting experts who offer such reports can be enumerated on the fingers of one hand, that is probably the end of the road, for such challenges. There is more scope to challenge a bespoke premium; there always was even under the **Rogers** approach, whether by encouraging a costs judge to take a deconstructionist approach to the premium, or by arguing that particular risks were not in fact underwriting risks (which required expert evidence to evaluate) but litigation risks, which a legally trained judge could evaluate. But how many of these ATE premiums are bespoke?

74. Of wider interest from this appeal, is the approach that the Court of Appeal has taken to the application of the principle of proportionality, in costs assessments generally. As this will affect all cases everywhere, I set out the relevant paragraphs in full below:

87. We are anxious not to restrict judges or force them, when assessing a bill of costs, to follow inflexible or overly-complex rules. One of the matters, however, which is apparent from the many cases cited to us, and from the submissions of counsel on the hearing of these appeals, is that there is an absence of consistency in the way in which costs bills are assessed. Taking the various points made above and drawing them together, we give the following guidance on an appropriate approach.

88. First, the judge should go through the bill line-by-line, assessing the reasonableness of each item of cost. If the judge considers it possible, appropriate and convenient when undertaking that exercise, he or she may also address the proportionality of any particular item at the same time. That is because, although reasonableness and proportionality are conceptually distinct, there can be an overlap between them, not least because reasonableness may be a necessary condition of proportionality: see Rogers at paragraph 104. This will be a matter for the judge. It will apply, for example, when the judge considers an item to be clearly disproportionate, irrespective of the final figures.

89. At the conclusion of the line-by-line exercise, there will be a total figure which the judge considers to be reasonable (and which may, as indicated, also take into account at least some aspects of proportionality). That total

figure will have involved an assessment of every item of cost, including court fees, the ATE premium and the like.

90. The proportionality of that total figure must be assessed by reference to both r.44.3(5) and r.44.4(1). If that total figure is found to be proportionate, then no further assessment is required. If the judge regards the overall figure as disproportionate, then a further assessment is required. That should not be line-by-line, but should instead consider various categories of cost, such as disclosure or expert's reports, or specific periods where particular costs were incurred, or particular parts of the profit costs.

91. At that stage, however, any reductions for proportionality should exclude those elements of costs which are properly regarded as unavoidable, such as court fees, the reasonable element of the ATE premium in clinical negligence cases, and the like. Specifically, therefore, if the ATE premium is assessed as reasonable, it will not fall to be reduced by any further assessment of proportionality.

92. The judge will undertake the proportionality assessment by looking at the different categories of costs (excluding the unavoidable items noted above) and considering, in respect of each such category, whether the costs incurred were disproportionate. If yes, then the judge will make such reduction as is appropriate. In that way, reductions for proportionality will be clear and transparent for both sides.

93. Once any further reductions have been made, the resulting figure will be the final amount of the costs assessment. There would be no further stage of standing back and, if necessary, undertaking a yet further review by reference to proportionality. That would introduce the risk of double-counting.

75. What this means is two fold. The first is that the practice of looking at reasonableness and then the overall figure, absent such elements as court fees etc is now dead. Instead, proportionality can be applied at the line by line stage of the assessment. Secondly, proportionality is now to be applied not to the overall total of costs in aggregate, but by reference to categories of costs.

76. Which is astonishing.

77. Just think about it. The conceptual rasp you hear you hear in your mind, is the sound of a lit match struck, and about to fall into the waiting pool of litigious petrol.

78. What categories of costs? How are these to be defined? How are these to relate to a phased bill with phases that have been set on the basis the phase totals are reasonable and proportionate?

79. How does this relate to paragraph 52 in **Harrison** which states:

I add that where, as here, a costs judge on detailed assessment will be assessing incurred costs in the usual way and also will be considering budgeted costs (and not departing from such budgeted costs in the absence of "good reason") the costs judge ordinarily will still, as I see it, ultimately have to look at matters in the round and consider whether ***the resulting aggregate figure*** *is proportionate, having regard to CPR 44.3 (2)(a) and (5): a further potential safeguard, therefore, for the paying party.*

80. I predict two consequences.

First, the time spent adding up the bill after the assessment (assuming that it is not digital) and then as part of this process devising categories of costs for arguments sake, has now doubled.

Secondly, the proportionality argument which (notwithstanding the recent High Court decision of Mr Justice Marcus Smith) had reached the position of being the untidy spent fag end, of many assessments across the country in the county court, is now potentially very much alight again.

QOCS

81. QOCS like so many areas of costs litigation, could be described as the gift that never stops giving. In 2018 alone for example, I found myself arguing two cases in the Court of Appeal on various aspects of the provisions.

82. An interesting recent decision of the Court of Appeal that has caught my eye is that of Brown v The Commissioner of Police of the Metropolis [2019] EWCA Civ 1724 which has something to say on the categorisation of mixed claims, a term not actually to be found in part 44 CPR, but which aptly describes the situation where part of an action is concerned with a claim that attracts QOCS protection, and part of an action includes a claim which does not attract QOCS protection. In such circumstances, what is the court at first instance meant to do, when determining if and to what extent the triumphant defendant can enforce its award of costs?

83. I wrote about the judgment in the High Court almost a year ago here: http://costsbarrister.co.uk/uncategorized/qocs-continued/. pondering

the question of why rule 44.12 CPR was not engaged in the argument, to deal with the set off of the claimants cost against the defendants costs, almost as a preliminary to any wider considerations of clawback or enforcement.

84. The issues vexing the Court of Appeal were put in these terms:

1.This appeal concerns the rules relating to Qualified One-Way Costs Shifting ("QOCS") at CPR 44.13 – 44.16. QOCS provides automatic costs protection to a claimant with a claim for damages for personal injury, so as to ensure that, win or lose, such a claimant does not emerge from the proceedings with an adverse cost liability. In the present case, the claimant (whom I shall call 'the appellant') made various claims arising out of the respondents' wrongful obtaining and use of private information about her. It was what is often referred to as a 'mixed claim'; that is to say, her claims included a claim for damages for personal injury, but also included claims for non-personal injury damages and other relief. Claims for general damages for misuse of the appellant's personal data were upheld by the trial judge, but he rejected her claim for damages for personal injury. In circumstances where the appellant failed to beat the respondents' Part 36 offer, resulting in adverse costs orders against her, the question is whether the appellant can automatically avoid the enforcement of those orders by relying on the QOCS regime, on the ground that one of her failed claims was a claim for damages for personal injury.

2. For the reasons set out below, I consider that an analysis of the relevant parts of the CPR, supported by the existing first instance authorities, produces a negative answer to that question. In setting out those reasons, and notwithstanding the very particular facts of this case, I have endeavoured to give some guidance as to the proper application of the QOCS regime to mixed claims.

84. Rule 44.16(2) provides as follows:

(2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where –

(a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or

(b) a claim is made for the benefit of the claimant other than a claim to which this Section applies.

85. The court then grappled with the construction to be given to rule 44.16(2)(b)

31. What is the proper interpretation of the words "other than a claim to which this Section applies"? It seems to me quite clear. "This Section" is the Section of the CPR setting out the QOCS regime. Rule 44.13(1) identifies the three types of claim which are covered by that regime: they are claims for damages for personal injury. Thus, if the proceedings also involve claims made by the claimant which are not claims for damages for personal injury (that is to say, claims "other than a claim to which this Section applies"), then the exception at r.44.16(2)(b) will apply.

32. I consider that this is the sensible and straightforward interpretation of the rule. It also produces a logical and fair outcome. The QOCS regime only applies to claims for damages for personal injury. It does not apply to other types of claim There is therefore no justification for allowing claims which are not claims for damages for personal injury (such as, for example, the data protection or police misconduct claims which were successful in the present case) to attract automatic QOCS protection. It would be equally wrong to allow claimants with a mixed claim to use the fact that their claims includes a claim for damages for personal injury to gain automatic costs protection in respect of their claims for non-personal injury damages.

33. In my view, the exception at r.44.16(2)(b) was designed to deal with the situation where a claim for damages for personal injury was only one of the claims being made in the proceedings. In those circumstances, the automatic nature of the QOCS protection falls away. But of course, that is not the end of the matter: it then becomes a question of the judge's discretion. I refer to that issue again in Section 5.4 below.

86. So far so simple. But as in many contexts where costs issues are concerned, confident statements of principle expressed in disarmingly simple terms can be difficult to implement when considering where pounds and pence have to be calculated. The court therefore went on to elucidate how the issue of costs in an action where there were claims benefiting from QOCS and other claims not benefiting from QOCS fell to be practically dealt with, together with some trenchant comments along the way:

52. During the course of the appeal, much was made by both Mr Jaffey and Ms Darwin about the effect of Whipple J's analysis on what might be called

'ordinary' claims for personal injuries. The court was given examples of plumbers with claims for loss of earnings or businessmen with damaged vehicles, with the suggestion that, as a result of Jeffreys, Siddiqui and the judgment below, QOCS protection would not be available to these (and numerous other) hypothetical claimants. In an undoubtedly memorable submission, Ms Darwin went so far as to suggest that, if the appeal was not allowed, it would mean that, by reference to the well-worn facts of Donoghue v Stevenson, Ms Donoghue would have lost her QOCS protection if she had been claiming for the cost of another bottle of ginger beer, as well as for damages for gastro-enteritis.

53. Whilst this court should be wary about endeavouring to give comprehensive guidance in circumstances where the appeal arises out of a very different type of litigation, it does seem to me that there are some straightforward points that can be made which answer the submissions made, and which may be of assistance to those grappling with the outer limits of the QOCS regime.

54. The starting point is that QOCS protection only applies to claims for damages in respect of personal injuries. What is encompassed by such claims? It seems to me that such claims will include, not only the damages due as a result of pain and suffering, but also things like the cost of medical treatment and, in a more serious case, the costs of adapting accommodation and everything that goes with long term medical care. In addition, contrary to the submissions advanced by Ms Darwin and Mr Jaffey, I consider that a claim for damages for personal injury will also encompass all other claims consequential upon that personal injury. They will include, for example, a claim for lost earnings as a result of the injury and the consequential time off work. 55. In other words, a claim for damages in respect of personal injury is not limited to damages for pain and suffering. For these reasons, as Whipple J noted at [60] of her judgment, claimants in a large swathe of 'ordinary' personal injury claims will have the protection and certainty of QOCS.

87. The most interesting part of the judgement is the commentary in paragraphs 56 and 57, which illustrate how credit hire claims which have conveniently proceeded under the shield of QOCS may now do so no longer, in circumstances, where correctly identified, a road traffic accident will almost always result in a number of causes of action: for personal injury, and for property damage to the vehicle, conveniently brought in the same claim form, but in reality separate claims:

56. I acknowledge that, in personal injury proceedings, another common claim will be for damage to property. For example, in RTA litigation, there will usually be a claim for the cost of repairs to the original vehicle, and the cost of alternative vehicle hire until those repairs are effected. Such claims are not consequential or dependent upon the incurring of a physical injury: they are equally available to a claimant who survived the accident without a scratch as they are to a claimant who broke both legs in the accident. They are claims consequent upon damage to property, namely the vehicle that suffered the accident, and therefore fall within the mixed claim exception at r.44.16(2)(b).

88. Having opened a trap door, under the credit hire industry, the court then swiftly put in place a safety net, which for most purposes will nullify the scope of paragraph 56:

57. But in such proceedings, the fact that there is a claim for damages in respect of personal injury, and a claim for damage to property, does not mean that the QOCS regime suddenly becomes irrelevant. On the contrary, I consider that, when dealing with costs at the conclusion of such a case, the fact that QOCS protection would have been available for the personal injury claim will be the starting point, and possibly the finishing point too, of any exercise of the judge's discretion on costs. If (unlike the present case) the proceedings can fairly be described in the round as a personal injury case then, unless there are exceptional features of the non-personal injury claims (such as gross exaggeration of the alternative car hire claim, or something similar), I would expect the judge deciding costs to endeavour to achieve a 'cost neutral' result through the exercise of discretion. In this way, whilst it will obviously be a matter for the judge on the facts of the individual case, I consider it likely that, in most mixed claims of the type that I have described, QOCS protection will – in one way or another – continue to apply.

58. It is however important that flexibility is preserved. It would be wrong in principle to conclude that all mixed claims require discretion to be exercised in favour of the claimant, because that would lead to abuse, and the regular 'tacking on' of a claim for personal injury damages (regardless of the strength or weakness of the claim itself) in all sorts of other kinds of litigation, just to hide behind the QOCS protection (as Foskett J warned in Siddiqui).

59. Accordingly, I reject the suggestion that, if QOCS protection is not extended to cover every kind of mixed claim, then it will have a potentially adverse effect on personal injuries litigation generally. On the contrary, the absence of any cases hitherto in which this point has arisen in an ordinary personal injury claim only confirms my belief that costs in such cases have generally been properly addressed.

60. The analysis set out above is sufficient to dispose of this appeal. However, the court heard a number of wider submissions about access to justice. Since a number of those submissions were based on what I consider to be false premises, it is appropriate to say something about that aspect of this appeal.

89. Finally the court went on to pooh-pooh the notion that a narrow construction, or application of QOCS rules, would impair access to justice:

68. Finally, much was made about the deterrent effect that the judgments in Jeffreys, Siddiqui and the present case may or will have upon claimants who are considering bringing proceedings. Again, that wide-ranging submission needs to be carefully analysed.

69. I accept that a claimant is more likely to bring a claim if he or she knows that there will be no adverse cost consequences of so doing. That is self-evident, so it is therefore unsurprising that the anecdotal evidence gathered together by the intervener is to the same effect. But it cannot sensibly be described as a deterrent to advise a claimant pursuing a claim for non-personal injury damages that the question of costs will be a matter for the judge's discretion at the end of the case.

70. Finally, in connection with the deterrent argument, Ms Darwin made much of the need to ensure access to justice for victims of personal injury. Of course: that is what the QOCS regime is all about. But in the present case, the appellant was not the victim of personal injury: her claim for personal injury damages was rejected and there was no appeal. The appellant did have a valid (non-personal injury) claim under the DPA and HRA and in tort on which she was successful. Her difficulty was that she had refused the offers of a total of £18,000 and at the end of the trial recovered just £9,000. In other words, the proceedings following the appellant's rejection of the offer, were a waste of time and money for all parties, having been necessitated only by the appellant's refusal to accept much more than she eventually recovered. Should the appellant be able to avoid the usual cost consequences of her conduct, merely because she had a claim for damages for personal injury which the judge rejected? For all the reasons I have given, the answer must be No, and no wider considerations of access to justice, properly analysed, can make any difference to that conclusion.

Portal costs

90. From time to time, I deal with issues arising on the MOJ Portal and the various protocols which apply to the low value personal injury claims which

proceed through it.

91. It is like entering the quantum realm: where the natural rules which govern the universe do not apply and strange things happen.

92. A recent example concerned a case which a solicitor had thought was worth more than £25,000 in value, had utilised the Personal Injury Pre-action Protocol, and after receiving denials of liability, subsequently issued part 7 proceedings limited to £20,000 having in the meantime revised downwards the valuation of the claim.

93. Foul! Cried the defendants, and on assessment of costs, argued that the claim should have been submitted via the MOJ Portal, with the happy consequence that the claim for costs should be limited to fixed costs accordingly.

94. The principal issue can be framed thus:

Having regard to all the circumstances of the case under rule 44.4 CPR was the issuance of part 7 proceedings/non submission of a Claims Notification Form, conduct on the part of the Claimant which means the costs claimed in the Bill should be disallowed as disproportionate and unreasonably incurred?

95. The Pre-Action Protocol for Low Value Personal Injury (Employers Liability and Public Liability Claims provides so far as is material:

2.1 This Protocol describes the behaviour the court expects of the parties prior to the start of proceedings where a claimant claims damages valued at no more than £25,000 in an employers' liability claim or in a public liability claim. The Civil Procedure Rules 1998 enable the court to impose costs sanctions where this Protocol is not followed.

And:

4.1 This Protocol applies where—

(1) either—

(a) the claim arises from an accident occurring on or after 31 July 2013; or

(b) in a disease claim, no letter of claim has been sent to the defendant before 31 July 2013;

(2) the claim includes damages in respect of personal injury;

(3) the claimant values the claim at not more than £25,000 on a full liability basis including pecuniary losses but excluding interest ('the upper limit'); and

(4) if proceedings were started the small claims track would not be the normal track for that claim.

And if liability is denied:

6.13 The claim will no longer continue under this Protocol where the defendant, within the relevant period in paragraph 6.11 —

(1) makes an admission of liability but alleges contributory negligence;

(2) does not complete and send the CNF response;

(3) does not admit liability; or

(4) notifies the claimant that the defendant considers that—

(a) there is inadequate mandatory information in the CNF; or

(b) if proceedings were issued, the small claims track would be the normal track for that claim.

6.14 Where the defendant does not admit liability the defendant must give brief reasons in the CNF response.

6.15 Where paragraph 6.13 applies the claim will proceed under the relevant Pre-Action Protocol and the CNF will serve as the letter of claim (except where the claim no longer continues under this Protocol because the CNF contained inadequate information). Time will be treated as running under the relevant Pre-Action Protocol from the date the form of acknowledgment is served under paragraph 6.9 or 6.10.

Rule 45.24 CPR provides so far as is relevant as follows:

(1) This rule applies where the claimant –

(a) does not comply with the process set out in the relevant Protocol; or

(b) elects not to continue with that process,

and starts proceedings under Part 7.

(2) Subject to paragraph (2A), where a judgment is given in favour of the claimant but –

(a) the court determines that the defendant did not proceed with the process set out in the relevant Protocol because the claimant provided insufficient information on the Claim Notification Form;

(b) the court considers that the claimant acted unreasonably –

(i) by discontinuing the process set out in the relevant Protocol and starting proceedings under Part 7;

(ii) by valuing the claim at more than £25,000, so that the claimant did not need to comply with the relevant Protocol; or

(iii) except for paragraph (2)(a), in any other way that caused the process in the relevant Protocol to be discontinued; or

(c) the claimant did not comply with the relevant Protocol at all despite the claim falling within the scope of the relevant Protocol,

the court may order the defendant to pay no more than the fixed costs in rule 45.18 together with the disbursements allowed in accordance with rule 45.19.

96. That rule has very limited direct application as the vast majority of these cases will settle before judgment: most costs orders will be deemed ones.

97. But conduct of the parties is relevant as part of a broad assessment of the quantum of costs. Rule 44.4 CPR provides as follows:

(1) The court will have regard to all the circumstances in deciding whether costs were –

(a) if it is assessing costs on the standard basis –

(i) proportionately and reasonably incurred; or

(ii) proportionate and reasonable in amount, or

(b) if it is assessing costs on the indemnity basis –

(i) unreasonably incurred; or

(ii) unreasonable in amount.

(2) In particular, the court will give effect to any orders which have already been made.

(3) The court will also have regard to –

(a) the conduct of all the parties, including in particular –

(i) conduct before, as well as during, the proceedings; and

(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case;

(g) the place where and the circumstances in which work or any part of it was done; and

(h) the receiving party's last approved or agreed budget.

(Rule 35.4(4) gives the court power to limit the amount that a party may recover with regard to the fees and expenses of an expert.)

98. The interrelationship between rules 45.24, 44.4 and the question of how non-compliance with a relevant Protocol should be addressed by the

court has been the subject of binding authority in the case of **Williams v Secretary of State for Business Energy and Industrial Strategy [2018] 4 WLR 147.**

99. In that case Coulson LJ dealt with the non-application of rule 45.24 CPR in these terms:

However, as Judge Godsmark QC found, rule 45.24 does not apply to the facts of the present case. There have been no Part 7 proceedings. There has been no judgment. Although Mr Hutton QC sought to argue that in some way the requirement for Part 7 proceedings and a final judgment were simply examples of when the court could exercise its discretion under rule 45.24 , I am unable to accept that submission. It is clear that rule 45.24 is dealing with specific circumstances where the court may exercise its discretion to order the payment of no more than fixed costs. Those circumstances (where there are Part 7 proceedings and a judgment) are not examples, but pre-conditions which have to exist before the rule can be applied.

100. He went onto explain how rule 44.4 CPR could be applied:

These provisions contain numerous ways in which a party whose conduct has been unreasonable can be penalised in costs (what I shall call "the Part 44conduct provisions"). In my view, the Part 44 conduct provisions provide a complete answer to a case like this. They provide ample scope for a district judge or a costs judge, when assessing the costs in a claim which was unreasonably made outside the EL/PL Protocol, to allow only the fixed costs set out in the EL/PL Protocol.

And:

In my view, it is at this point that paragraphs 2.1, 3.1 and the warning at 7.59 of the EL/PL Protocol, become relevant. Taken together, those paragraphs comprise a clear indication that, if a claim should have been started under the Protocol but was not, and it was unreasonable that the claim was not so started, then by the operation of the Part 44 conduct provisions, the claimant should be limited to the fixed costs that would have been recoverable under the EL/PL Protocol.

Further:

In both O'Beirne and Javed , the assessment was to be undertaken by reference to what is now rule 44.4 (which, at the time of both those cases, was rule 44.5), namely by having regard to all the circumstances of the case,

including conduct. It seems to me that, in a case where a claim was not reasonably made under a Protocol, rule 44.11 (Misconduct) is of equal, if not more, importance. It will very often be because of misconduct on the part of the claimant or the claimant's legal representatives that a claim was made which unreasonably avoided the relevant Protocol altogether. In addition, I note that, whilst O'Beirne favoured an item by item approach to the assessment, Master Simons in Javed said that that was unnecessary in these sorts of circumstances. For my own part, I prefer the approach of Master Simons. If the judge has concluded that, as a result of unreasonable conduct, the relevant fixed costs represent the maximum recovery, then an item by item approach is unnecessary.

(emphasis added)

101. There is a bemusing number of County Court judgments which are invoked in this area. Largely, they can be described as irrelevant and should not be cited in court. The County Court cannot set a precedent. The doctrine of stare decisis applies. The position is as set out in the **Practice Direction (Citation of Authorities) [2001]** noted at page2538 of the White Book:

6.1 A judgment falling into one of the categories referred to in paragraph 6.2 below may not in future be cited before any court unless it clearly indicates that it purports to establish a new principle or to extend the present law. In respect of judgments delivered after the date of this Direction, that indication must take the form of an express statement to that effect. In respect of judgments delivered before the date of this Direction that indication must be present in or clearly deducible from the language used in the judgment.

6.2 Paragraph 6.1 applies to the following categories of judgment:
Applications attended by one party only
Applications for permission to appeal
Decisions on applications that only decide that the application is arguable
County Court cases, unless
(a) cited in order to illustrate the conventional measure of damages in a personal injury case; or
(b) cited in a County Court in order to demonstrate current authority at that level on an issue in respect of which no decision at a higher level of authority is available.

(emphasis added)

102. It follows that in so far as it was ever appropriate to cite fact specific decisions in low value claims by various members of the County Court bench,

that point has passed now that there is a binding decision of the Court of Appeal.

103. In the instant case, the decision not to use the MOJ Portal, would be reasonably informed by the denials of liability made earlier . Submitting Claims Notification Forms would thus have been a pointless exercise. Moreover, for the reasons set out above, **Williams** and the clear wording of rule 44.4 CPR require the court to consider all the circumstances of the case, and including conduct before, as well as during the proceedings, including in this case the fact that the claim was defended after the issue of proceedings.

104. The defendants complaint was about the quantum of costs, but the answer really lay in their hands. They could have promptly admitted liability. They could have made a well-judged early part 36 offer. They did neither of those things. As the court observed, the purpose of submitting a claim through the MOJ Portal was to negotiate a settlement. Where liability is disputed, there is nothing to be achieved by utilising the MOJ Portal.

Solicitor own client costs

Retainers and client care letters

105. One of the interesting developments of the last decade or so has been the rise of behavioural science, its acceptance by the political establishment and its deployment into mainstream policy making by politicians. In 2008, Richard Thaler and Cass Sunstein's book **Nudge: Improving Decisions About Health, Wealth, and Happiness** gained a following among politicians in the United Kingdom. The authors refer to influencing behaviour without coercion as "libertarian paternalism" and the influencers as choice architects. Thaler and Sunstein defined their concept as:

A nudge, as we will use the term, is any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid. Nudges are not mandates. Putting fruit at eye level counts as a nudge. Banning junk food does not.

106. This in turn led to the establishment as part of the Cabinet Office in 2010, of the Behavioural Insights Team. The team ran a series of trials with HMRC that sought to improve tax collection rates by making it easier for individuals to pay. One of the simplest interventions involved testing the impact of directing letter recipients straight to the specific form they were

required to complete, as opposed to the web page that included the form. This increased response rates by 19 to 23%

107. The team also worked with the Ministry of Justice, devising a policy that prompted those owing the UK Courts Service fines with a text message ten days before the bailiffs were to be sent to a person, which doubled payments made without the need for further intervention. This innovation has reportedly saved the Courts Service £30 million a year.

108. At its heart, behavioural science rejects the notion that people are calm, rational decision makers, capable of infinite patience and weighing of evidence, and are rather creatures driven by instinct, much of whose decision making is subconscious and capable of being "nudged". They are human beings and not an alien species, known as the "econ".

109. For many years I have had an interest in behavioural psychology. The field is closely related to a quality that all lawyers should possess namely: empathy. That is the ability to share and understand the feelings of another.

110. I would emphasise the word "feelings": because although we may kid ourselves that we are creatures of logic, moving smoothly from rational decision to rational decision, much decision making is unconscious, or instinctive and not based on objective evaluation of the circumstances we find ourselves in.

111. An example will suffice: do you buy goods or services online? Do you always read the terms and conditions, scrolling carefully through them? Or do you just click "accept", not knowing that in so doing you have agreed to give your children into slavery, by carefully drafted small print?

112. This is irrational behaviour, which is the *normal* reaction of most human beings. It follows that as a measure of consumer protection, requiring terms and conditions to be placed on a screen, where a consumer is free to scroll down them and read them at leisure, is utterly useless, as it does not achieve the objective of creating informed choice. A similar point can be made against the provision of documents with lengthy terms and conditions: people continue to sign them, without reading them, so what good is achieved by providing the terms and conditions?

113. It also raises the larger question, which is whether our current legal system predicated on alleged rational decision making is no such thing: and there are fascinating studies that have taken place, which reveal that, for example, when sentencing in the criminal courts, the severity of the sentence

that you might get, can be affected by the time of day when sentence is handed down, and whether the judge is hungry or has been fed.
See: https://www.theguardian.com/law/2011/apr/11/judges-lenient-break.

114. If such considerations apply to purchasing goods or services online or to the decision making process of the courts, how much more do they apply to clients: and it follows that when taking instructions from a client or litigating their case, it is extremely dangerous to assume that they will behave rationally, by e.g. always reading letters that you send them, or that they will assiduously check the truth of what they tell you, against available contemporaneous documents or more prosaically, that they will actually correct witness statements, prior to reading them. Yet they are litigating in a court system designed for "econs" and predicated on the assumption that decisions made by courts are rational and based upon the evidence.

115. Stepping back, this problem is evident at the earliest stage, when a client retains a solicitor, and is provided with copious written material, which is meant to govern the relationship between client and solicitor, and fulfill the purpose of providing consumer protection for the client. It won't work, if the client doesn't read it or if they do read it, doesn't understand it.

116. I would therefore suggest that the current system of client care and provision of client care letters, retainer provisions and terms and conditions of business is not fit for the purpose of providing real consumer protection to clients, both in terms of the basis upon which solicitors charge and the way that charging methodology is then recorded and explained . It needs to be fundamentally reshaped to deal with the real needs of the clients who are represented by solicitors.

117. I deal with the charging basis first. Let me take as an example, personal injury claims, as a type of consumer claim. I would hazard that most clients will not understand the conditional fee agreement they are provided with. They will not understand the subtle difference between a 100% success fee on costs and a 25% deduction from their damages, they will not understand that if they agree to a conditional fee agreement without a success fee, they are still at risk of unrecovered base charges eating into their damages. They will probably make their retainer remotely, with a firm located in another part of the country and simply sign whatever is provided to them by email or in the post and what is provided to them, will cover many pages of impenetrable retainer documentation.

118. This retainer documentation will have been created using a model conditional fee agreement and a client care letter written with an eye to

the **Law Society Practice Note June 2018 Law Society Guidance on retainers**. This document notes without any irony **"***There are relatively few outcomes that require you to provide information in writing. These relate to complaints.*".

119. But reading into the document that is not quite right. Clients must be made aware in writing of their right to make a complaint and details of how to do so. They must also be advised of their right to complain to the Legal Ombudsman. They must further be aware of their right to challenge or complain about a bill, including their rights to an assessment of costs under part III of the Solicitors Act 1974. Moreover as the document unfolds, it makes it plain that clients must be informed the solicitors regulatory status, provided with cost information and fee arrangements, told about any separate businesses and there must be an agreement about service levels including for example the type and frequency of communications.

120. Although this information need not be provided in writing, it would be a bold or incautious solicitor, who does not record it in writing. Nor is this a new problem or one that goes unrecognised. Section 4.12 of the **Guidance** notes this:

Many clients comment about being given large documents containing lots of legal language in small print by their solicitors. Often these documents are not read or understood.

121. The advice given by the Law Society is to alter the style, which is used to write these documents, in an attempt to make them more user friendly.

You may wish to consider adopting the following style for your written client information to help clients understand the contents:

- *ensure the key information is highlighted early on. If the document exceeds three pages, you may wish to move detailed information into annexes. This will help ensure important information is not overlooked*
- *use a clear font, in no smaller than 11 point*
- *make use of headings and bullet points to break up blocks of text and highlight points*
- *use plain language*
- *only include terms and conditions which actually apply to the specific retainer*
- *where a document is long, include a table of contents.*

122. However, the Guidance also goes on to heap yet more written requirements on the solicitors head, promising that on the one hand there is

no regulatory requirement to set out terms of business, whilst on the other noting ominously that it is good business practice to do so. These terms of business are stated to include the following matters.

Terms of business will normally set out details of:

- *standards of service clients can expect*
- *information on professional indemnity insurance (also see requirements under Provision of Services Regulations 2009)*
- *verifying bank account details in order to protect against fraud*
- *data protection issues*
- *storage of documents and any related costs*
- *confidentiality and disclosure*
- *outsourcing of work*
- *auditing and vetting of files*
- *any clauses limiting liability*
- *processes for terminating the retainer*
- *client due diligence you will undertake financial arrangements with clients.*

123. But what is the point of all these provisions, if the client is not actually going to read them, and if they do, is not going to understand them?

124. I am frequently asked to draft retainer agreements, conditional fee agreements, and client care letters.

125. When I ask to see the documents currently in use, they always resemble a "coral reef" of provisions, which have been added to over the years, with fresh terms and conditions, but nothing is ever taken away: the result being that the documents get longer and longer, and are often contradictory in whole or in part. This is most unsatisfactory, and my task is usually to simplify and reduce, rather than to expand upon what has been done in the past.

126. I would suggest that a radical new approach could usefully be taken, to the practice both of charging clients and giving them real consumer protection, and reform of the second, is easier to achieve than the first.

112. In respect of reforms to the practice of charging, there would have to be the repeal and replacement of the Solicitors Act 1974, with amendments to the Courts and Legal Services Act 1990 to sweep away the nonsense of damages based agreements which don't work, and conditional fee agreements which don't reflect the realities of the agreements that solicitors

and clients want to make. Obtaining primary legislation seems most unlikely in the current climate.

127. In respect of consumer protection, a lot could be done to simplify retainers and make them easier for clients to understand. Most retainers could be reduced to 2000 words in my view, and most client care protections made standard to all clients and set out in the Solicitors Handbook. There is no need to duplicate them in a client care letter.

128. Moreover, it could be made a regulatory requirement that a solicitor or solicitor's representative must give an oral explanation to the client of key provisions and keep a record of it.

129. Since the advent of email, people don't talk to each other as they used to, but a conversation is a much better way of ensuring the most important information is conveyed in a way, where there is a reasonable chance that the client will actually understand what their rights and obligations are, with a better prospect of achieving the objective of consumer protection accordingly.

Contentious business agreements

130. Are all conditional fee agreements contentious business agreements? And if so, how might that effect a client's right to an assessment of the costs charged by her solicitor under the Solicitors Act 1974?

131. These are interesting questions but to start at the beginning, the Solicitors Act 1974 defines a contentious business agreement in these terms in section 59:

(1)Subject to subsection (2), a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done, or to be done, by him (in this Act referred to as a "contentious business agreement") providing that he shall be remunerated by a gross sum or by reference to an hourly rate, or by a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated.

(2)Nothing in this section or in sections 60 to 63 shall give validity to—

(a)any purchase by a solicitor of the interest, or any part of the interest, of his client in any action, suit or other contentious proceeding; or

(b)any agreement by which a solicitor retained or employed to prosecute any action, suit or other contentious proceeding, stipulates for payment only in the event of success in that action, suit or proceeding; or

(c)any disposition, contract, settlement, conveyance, delivery, dealing or transfer which under the law relating to bankruptcy is invalid against a trustee or creditor in any bankruptcy or composition.

132. Section 60 goes on to state so far as is material:

(1)Subject to the provisions of this section and to sections 61 to 63, the costs of a solicitor in any case where a contentious business agreement has been made shall not be subject to assessment or (except in the case of an agreement which provides for the solicitor to be remunerated by reference to an hourly rate) to the provisions of section 69.

(2)Subject to subsection (3), a contentious business agreement shall not affect the amount of, or any rights or remedies for the recovery of, any costs payable by the client to, or to the client by, any person other than the solicitor, and that person may, unless he has otherwise agreed, require any such costs to be assessed according to the rules for their assessment for the time being in force.

(3)A client shall not be entitled to recover from any other person under an order for the payment of any costs to which a contentious business agreement relates more than the amount payable by him to his solicitor in respect of those costs under the agreement.

(4)A contentious business agreement shall be deemed to exclude any claim by the solicitor in respect of the business to which it relates other than—

(a)a claim for the agreed costs; or

(b)a claim for such costs as are expressly excepted from the agreement.

133. It can be seen that a key element of a contentious business agreement, is that a client's absolute right to an assessment of costs, is removed by section 60(1). However the client is not stripped of all consumer protection and left quivering and helpless before the solicitor's indefeasible bill of costs. Quite the contrary, as section 61 makes plain:

(1)No action shall be brought on any contentious business agreement, but on the application of any person who—

(a)is a party to the agreement or the representative of such a party; or

(b)is or is alleged to be liable to pay, or is or claims to be entitled to be paid, the costs due or alleged to be due in respect of the business to which the agreement relates,

the court may enforce or set aside the agreement and determine every question as to its validity or effect.

(2)On any application under subsection (1), the court—

(a)if it is of the opinion that the agreement is in all respects fair and reasonable, may enforce it;

(b)if it is of the opinion that the agreement is in any respect unfair or unreasonable, may set it aside and order the costs covered by it to be assessed as if it had never been made;

(c)in any case, may make such order as to the costs of the application as it thinks fit.

(3)If the business covered by a contentious business agreement (not being an agreement to which section 62 applies) is business done, or to be done, in any action, a client who is a party to the agreement may make application to a costs officer of the court for the agreement to be examined.

(4)A costs officer before whom an agreement is laid under subsection (3) shall examine it and may either allow it, or, if he is of the opinion that the agreement is unfair or unreasonable, require the opinion of the court to be taken on it, and the court may allow the agreement or reduce the amount payable under it, or set it aside and order the costs covered by it to be assessed as if it had never been made.

(4A)Subsection (4B) applies where a contentious business agreement provides for the remuneration of the solicitor to be by reference to an hourly rate.

(4B)If on the assessment of any costs the agreement is relied on by the solicitor and the client objects to the amount of the costs (but is not alleging that the agreement is unfair or unreasonable), the costs officer may enquire into—

(a)the number of hours worked by the solicitor; and

(b)whether the number of hours worked by him was excessive.

(5)Where the amount agreed under any contentious business agreement is paid by or on behalf of the client or by any person entitled to do so, the person making the payment may at any time within twelve months from the date of payment, or within such further time as appears to the court to be reasonable, apply to the court, and, if it appears to the court that the special circumstances of the case require it to be re–opened, the court may, on such terms as may be just, re–open it and order the costs covered by the agreement to be assessed and the whole or any part of the amount received by the solicitor to be repaid by him.

134. As can be seen from the text of this section, the solicitor's right to sue on the unpaid bill, is removed, and any action brought under part 7 CPR by claim form is liable to be struck out I would suggest, as a nullity. Instead the unpaid solicitor would have to make an application to enforce the contentious business agreement. He does so at risk that the contentious business agreement if found to be unfair or unreasonable, might be set aside in its entirety and his claim to costs subject to the rigours of a solicitor-own client assessment. Further as section 61(5) makes clear the client has a like right to challenge the fairness and reasonableness of the contentious business agreement, with the potential prize of a solicitor-own client assessment.

135. So there are advantages and disadvantages to a solicitor making a contentious business agreement, whether by way of conditional fee agreement or otherwise, but to return to the essential question: are all conditional fee agreements, contentious business agreements because they are necessarily made in writing?

136. In **Hollins v Russell [2003] EWCA Civ 718** the Court of Appeal stated this at paragraph 93:

In any event, as we have already said at paragraph 52 above, even if correct, this argument would be of no help to the receiving parties because of the indemnity principle. Again, a great deal of the argument before us was directed at qualifying the application of that principle in these cases. Ultimately, however, it became clear that a CFA is a contentious business agreement to which section 60(3) of the Solicitors' Act 1974 (see para 23 above) applies. If the solicitor cannot enforce the agreement against his client, then the amounts provided for in the agreement are not payable by the client at all (as discussed in paras 113 to 116 below, the position as to the ATE premium and disbursements is different). In the present state of the law, therefore, they cannot be recovered from the other side.

137. Seemingly to confirm that all conditional fee agreements are contentious business agreements.

138. This approach was adopted by Master Gordon-Saker in the interesting case of Vilvarajah v West London Law SCCO 17th May 2017 Master Gordon-Saker where he concluded principally by reason of a high hourly rate of £420 being charged for relatively mundane litigation that it would be appropriate to set aside the conditional fee agreement under section 61 and assess the costs. A bill of costs totalling £31,945.48 was thus reduced to £15,323.20.

139. Of course most Law Society Model CFAs will include a recital that the conditional fee agreement is **not** a contentious business agreement. But just how effective is this recital to exclude the potentially sweeping effect of section 61? In the recent case of **Healys LLP v Partridge and Partridge : [2019] EWHC 2471 (Ch)** the deputy High Court judge found that a conditional fee agreement was a contentious business agreement, but noted the absence of exclusionary wording in the agreement that he was concerned with:

38. That does not of course necessarily mean that every CFA will be a contentious business agreement for the purposes of Part III of the 1974 Act. I note, for example, that the Law Society's model form CFA for personal injury and clinical negligence cases contains a specific clause providing that the agreement is not a contentious business agreement within the terms of the 1974 Act. Without expressing any view on the construction and effect of agreements containing a clause of that nature, I note that the present CFA contained no such clause, nor anything else to suggest that it should fall outside the scope of the s. 59 definition.

140. It will be observed that there are many statutory contexts where the expressed intent of the parties as to a state of affairs may be ignored by the court assessing the reality of the situation. Those who remember fondly their land law will recall Lord Templeman's pithy encapsulation of why a document stated to be a licence was in fact a lease:

It was submitted on behalf of Mr. Street that the court cannot in these circumstances decide that the agreement created a tenancy without interfering with the freedom of contract enjoyed by both parties. My Lords, Mr Street enjoyed freedom to offer Mrs Mountford the right to occupy the rooms comprised in the agreement on such lawful terms as Mr Street pleased. Mrs Mountford enjoyed freedom to negotiate with Mr Street to obtain different terms. Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the

written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.

141. It remains to be seen, whether the Law Society Model conditional fee agreement's clause declaiming that it is not a contentious business agreement, will prove to be a "fork", or a "spade".

Disclosure of files

142. Today I have been considering the vexed question as to whether solicitors need to give disclosure of their files to former clients who have mislaid their own copies of documents or indeed who seek copies of documents that they may never have had. Often the disclosure is sought in order to commence litigation against the former solicitors, such as a solicitor-own client assessment under section 70 of the Solicitors Act 1974.

143. The starting point one would assume, is that as in other contexts where a principal employs an agent, one would have thought that implied into the contractual relationship is an obligation to produce documents created during the relationship, to the client upon payment of a reasonable fee.

144. But matters are not so simple in the relationship of solicitor-and-former client.

145. The leading authority at the current time is that of Hanley v JC & A Solicitors and another [2018] EWHC 2592 (QB) which as a decision of a High Court judge (Mr Justice Soole) given on appeal is binding upon lower courts absent some later decision of the Court of Appeal, which might upset its ratio. The issue in the conjoined appeals was framed succinctly by the judge in the following terms:

1. The issue in these appeals is whether the Court, under the inherent jurisdiction over its officers and/or s. 68 Solicitors Act 1974, has the power to order a solicitor to make and supply to his client (or former client) copies of documents which are the property of the solicitor, subject to payment of reasonable costs for the task.

146. The claim forms which had been issued sought the following relief:

9. By Claim Forms respectively issued 14 and 12 November 2017 in each action, the appellants sought '… an Order pursuant to s.68 Solicitors Act 1974 and/or the inherent jurisdiction of the High Court over solicitors/ s.7(9) Data Protection Act 1998 for – 1. Delivery of such parts of the Defendant's file over which the Claimant has proprietary rights, and 2. Delivery of copies of such other parts of the file over which the Claimant does not have proprietary rights. 3. The costs arising from this application to be paid by the Defendant.'

10. In each case the attached 'Details of Claim' claimed entitlement ('subject to reasonable copying charges') to copies of documents in a number of listed categories to which they asserted no proprietary right. They comprised '(i) Any electronic communications; (ii) Letters written by the Claimant to the Defendant; (iii) File copies of letters written by the Defendant to the Claimant; (iv) File copies of letters written by the Defendant to third parties; (v) Documents sent by the Claimant to the Defendant during the retainer, the property in which was intended at the date of despatch to pass from the Claimant to the Defendant; (vi) Attendance notes, working notes, diary notes that were prepared for the benefit and protection of the Defendant; (vii) Timesheets, accounts documents, invoices (including a cash account) sent to the Claimant;' and documents claimed pursuant to the Data Protection Act 1988.

147. It will be noted that no claim was made under the Senior Courts Act 1981 for pre-action disclosure or asserting that an implied term of the contract of retainer required production of the solicitors files. At the various hearings, no claim was pursued under the Data Protection Act 1998.

148. Instead the focus of the argument was on the court's power to order delivery up of documents under section 68 of the Solicitors Act or the inherent jurisdiction, but the problem this argument soon encountered, was that although the court can and will order delivery up from one party, of documents belonging to another that pre-supposes a proprietary right exists, in respect of which a remedy may be granted. A remedy must have a cause of action, and the two cannot be elided together.

149. The judgment then recorded an exhaustive trawl through various authorities, including some from the nineteenth century and others which were of only tangential significance. In the event the High Court was unpersuaded that the appellants were entitled to the relief sought, for the following reasons.

60. In my judgment the Court has no jurisdiction to make orders under the inherent jurisdiction and/or s.68 in respect of documents which are the property of the solicitor.

61. First, as a matter of principle, an order for delivery up or otherwise in relation to property belonging to another must have an explicit legal basis.

62. Secondly, the powers referred to in s.68 are derived from the inherent jurisdiction, not the statute itself. The section simply extends the reach of the jurisdiction to cases in which no business has been done in the High Court. It reflects, with immaterial amendments, the provisions of successive statutes governing solicitors. Thus the scope of the jurisdiction is to be identified from authority, rather than interpretation of the statutory language.

63. Thirdly, the decisions relied on by the appellants in my judgment provide no authority for their central proposition that the Court has a discretion under the inherent jurisdiction to order delivery up or make other orders in respect of documents which belong to the solicitor. I will deal with these in turn.

64. As to Horsfall and Holdsworth, in neither case was the disputed document the property of the solicitor. On the contrary, in each case the application succeeded because the client had paid for its preparation : see also Chantrey Martin at p.293.

65. As to Thompson, the underlying fact was that Mr Thompson had offered to supply copies of his documents on terms as to payment. That offer was unacceptable to Mrs Lowe. Asserting ownership in each of the two disputed categories, she claimed delivery up as of right. The issue was therefore whether the documents belonged to the client or the solicitor. The Court held that one category belonged to the solicitor, the other to the client. In consequence the client was entitled only to the latter. As to the former, in stating 'If therefore the client requires copies she can only have them on the terms of paying for them' the Master of the Rolls was simply referring back to the solicitor's offer to supply copies on such terms. He was not stating that there was jurisdiction to compel him to make and deliver copies of his documents upon the client's undertaking to pay for them.

66. As to Wheatcroft, Counsel for the solicitor resisted the application on the basis that the documents were the property of the solicitor, and the authority of Thompson. Brief as is the report, the Master of the Rolls evidently rejected the application on that basis. The solicitor was entitled to retain the documents as of right. The absence of any application for an order for copies to be made and supplied at the client's expense must have reflected the

correct understanding of Counsel for the applicant and the Court that the exercise of the jurisdiction was dependent on the issue of ownership. It provided no authority for a wider jurisdiction.

67. I do not accept that these authorities are merely reflective of an age when copying was a major task, nor that the decision in Wheatcroft is authority only for the protection of the solicitor's only record of documents. If the document and its contents are the solicitor's property which he is entitled to retain, there is no basis for circumvention of that proprietary right by some other form of order.

68. The importance of ownership is further confirmed by the decisions of the Court of Appeal in Leicestershire CC and Chantrey Martin. The distinction between the categories of documents which belong to the client and to the professional is long established : see in both cases the citation with approval of London School Board v. Northcroft (1889) Hudson's Building Contracts, 4th ed., vol. ii., p.147. In its generality, the distinction applies also to solicitors : see Chantrey Martin at p.293. These decisions are rightly relied on by the Law Society in its Practice Note 'Who owns the file?'

69. As to Crocker the present issue did not arise because there was no assertion by the respondent solicitors that the documents were their property. This doubtless explains the absence of citation of Thompson or Wheatcroft. In my judgment the decision is confined to its particular circumstances, including the policy terms.

70. As to Richards Butler, Hart J's brisk dismissal of the s.68 application was rightly founded on the issue of ownership; and is supported by the earlier authorities.

71. Fourthly, the critical requirement of ownership cannot be overcome by reference to the language of s.68; the overall purpose of Part III of the Solicitors Act 1974; analogy with CPR 31.16 or with the Court's powers on a s.70 application or with the rationale of the required ingredients of a statute bill; or the requirements of PD46 para 6.4. The inherent jurisdiction does not provide a form of pre-action disclosure of documents belonging to the solicitor.

72. It follows that I respectfully disagree with the decisions of Deeny J in Taggart and of Master Brown in Swain to the contrary effect; and thus with the proposition in the Law Society's letter of 28 June 2018 that there is a discretionary power under the inherent jurisdiction in respect of copies of documents belonging to the solicitor.

73. In reaching this conclusion on the appeals, I readily acknowledge the practical considerations and implications identified by the Court in Taggart and Swain. However I do not think that these can defeat the principle of ownership.

150. The court however went on to say, with a cautionary note, that solicitors may yet be penalised in costs if refusal to provide documents caused the issue of proceedings for a section 70 assessment, which proved unsuccessful:

74. All that said, it does not follow that solicitors should in all circumstances press their legal rights to the limit, nor that they can necessarily do so with impunity. To take one example, a refusal to comply with a former client's request for a copy of a mislaid CFA (made on an undertaking to pay a reasonable copying charge) so that advice may be obtained on the prospects of a s.70 application, would surely entitle the client to issue such an application notwithstanding the inability to comply with the procedural requirement in PD46 para. 6.4; and could have potential adverse costs implications for the solicitors within those proceedings, whatever their result.

151. The judgment led some little while later to a revision of the well known Practice Note, Who Owns the File? published by the Law Society which can be accessed here:

https://www.lawsociety.org.uk/support-services/advice/practice-notes/who-owns-the-file/

and which is usually the first port of call, when considering which parts of a file, belong to the client and which can properly be said, to belong to the solicitor.

ANDREW HOGAN