Case No: C64YM383

IN THE CENTRAL LONDON COUNTY COURT

Thomas More Building,
Royal Courts of Justice,
The Strand,
London WC2A 2LL

Date: 17th January 2020

Before :

HIS HONOUR JUDGE LETHEM

- -

Between :

PANAYOT IVANOV	**Appellant**
- and -	
STEVEN LUBBE	**Respondent**

- -
- -

Tom Morris (instructed by **True Solicitors LLP**) for the **Appellant**
Sofia Ashraf (instructed by **DWF Costs Ltd**) for the **Respondent**

Hearing date: 13th December 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE LETHEM

His Honour Judge Lethem :

1. When a case exits the Pre-Action Protocol For Low Value Personal Injury Claims In Road Traffic Accidents ('The Portal') and proceedings are issued, the costs are governed by the fixed costs regime found at Section IIIA of CPR of Part 45 of the CPR. The aspiration of the rule committee was to devise a fixed costs regime for such cases which was predictable and transparent and where the parties could come together in a spirit of amity, read off the values from the appropriate Table 6 and agree costs without court intervention. The reality is more prosaic. Thus, this judgement addresses two issues arising out of the fixed costs regime. I am told that there is no appellate decision on either and that they raise issues of considerable importance to practitioners in this area and have given rise to conflicting decisions at first instance. The first question is to identify the appropriate procedure for invoking the court's residual discretion in matters falling under the fixed costs regime in Section IIIA. The second issue is whether it is reasonable for a Claimant who is, or may be, entitled to fee remission using 'Help With Fees' to forego that benefit and pass the costs of the issue fee onto the Defendant.

BACKGROUND

2. The facts behind the case are almost incidental to the issues that arise in the appeal. They are indistinguishable from many cases that are heard up and down the country every day. The case arises out of a road traffic accident that occurred on the 6th April 2013. The Claimant commenced proceedings in the Portal. The case exited the Portal and Part 7 proceedings were commenced. On the 29th March 2018 the Claimant accepted a Defendant's part 36 offer in the sum of £6,500.00. It was accepted by both parties that, by virtue of CPR r.36.20, the Claimant was entitled to his costs in accordance with section IIIA of Part 45. No doubt in a spirit of amity the parties came together on or about the 20th August 2018 and agreed the costs with the exception of the issue fee of £455.00. The Respondent questioned his liability to pay the issue fee on the basis that the Appellant was, or may have been, entitled to fee remission and that it was not reasonable for the Claimant to have incurred the fee. Initially the Appellant's solicitors intended to invoke the detailed assessment procedure found at CPR r.47.6. They led the Respondent to believe that this was the course they would take and it has been made clear to me that the Respondent considers they were misled by the Appellant's solicitors. It seems that the solicitors then appreciated that a number of District and Costs Judges were refusing to assess such bills on the basis that there was no authority to assess. Accordingly, they issued a Part 23 application dated the 11th January 2019 whereby they sought an order that:

    1. The Defendant do pay the Court Issue fee in the sum of £455.00 within 14 days.

    2. The Defendant do pay the Claimant's costs of the application, summarily assessed in the sum of £_____within 14 days.

    That application was issued and came before District Judge Andrew Davies sitting at the Edmonton County Court on the 15th April 2019. The Claimant was represented by Mr James Batten and the Defendant by Mr. Robin Dunne.

PROCEEDINGS BEFORE THE LOWER COURT.

3. Both parties filed skeleton arguments for the hearing. It is noteworthy that the District Judge had thirty minutes to adjudicate on the matter. As he observed at the commencement of his judgment.

> "At the outset of the hearing, I expressed scepticism that the arguments raised in the skeletons could actually be dealt with in the 30 minutes allowed for the hearing. I was invited to deal with it within the time allowed. The argument has been economical and to the point."

I have not had to operate under any such pressure of time and it is apparent to me that counsel have been able to develop arguments to a much greater extent on the appeal. With the benefit of hindsight, I wonder if it was wise for counsel to press on with the matter with an inadequate time estimate.

4. When the Appellant filed and served his skeleton argument he was not aware that the Respondent would be taking a jurisdictional point. Hence Mr. Batten's skeleton argument did not address any issues of procedure or jurisdiction.[1]

5. Mr Dunne's skeleton raised the issue of procedure for the first time.[2] In it he argued that the application was misconceived because of procedural irregularity. Mr Dunne submitted that acceptance of a Part 36 offer creates a deemed costs order at r.36.20, where the case begins within the Portal. He submitted that r.36.20 refers to the disbursements listed at r.45.29I. That rule confers on the court a discretion in that it 'may' allow various classes of disbursements, including the court fees. This is a permissive provision and the corollary is that the court may decide not to award the disbursement in the exercise of its discretion. Essentially Mr. Dunne proposed in his skeleton argument that part 36 was, in this respect, a self contained code and that there was no right to make a stand-alone application to the court for payment of the disputed disbursement. The remedy for the Claimant was to commence detailed assessment proceedings which would be assessed by a costs officer, providing a simple and proportionate avenue for the Claimant. In support, Mr Dunne observed that the Appellant had written to the Respondent a letter dated the 7th September 2018, which was annexed to the application, in which they curiously redacted the last two paragraphs, one of which apparently reads:

> "Please note that if this offer is not accepted within 21 days then on day 22 a fixed costs bill will be drawn and served formally and the matter will proceed to assessment"[3]

Thus Mr. Dunne was able to suggest that the Claimant knew the correct procedure but chose not to follow it. He went on to argue that the Claimant was trying to obtain an assessment through the back door and potentially circumnavigate the provisions of r.44.3. A matter I return to.

6. At risk of digression I am bound to observe that I share Mr. Dunne's unease at the conduct of the Appellant's solicitors. It would be possible to interpret the redaction of

[1] The Appellant's skeleton commences at page 71 in the bundle.
[2] See page 75 for the Respondent's skeleton.
[3] I have not seen the unredacted letter. The redacted copy appears at page 50 and 51 in the bundle.

the letter of the 7th September 2018 as a conscious attempt to hide from the court the fact that the Appellant had originally agreed with the Respondent that a detailed assessment was the appropriate forum to resolve the fees dispute. For the next hearing I will order a witness statement from the partner with overall conduct of the case at the Appellant's solicitors addressing why they felt justified in redacting the document, what thought they gave to the fact that it erased the concession to which I have just referred and that the court might be misled. Having heard that explanation I will decide what, if any further action should be taken, which may include penalising the Appellant in costs.

7. Turning to the transcript of the hearing.[4] Both counsel indicated that their submissions would be limited. Mr Batten handed up the decision of Master Howarth in *Sharon Mughal v Samuel Higgs and EUI Ltd.* [PHW1703032] SCCO Unreported 6th October 2017. The report is brief, but the Master held that it was appropriate to make an application under r.23 as opposed to invoking the detailed assessment procedure. Paragraphs 7 to 10 set out the ratio of his decision:

> "7. ..it seems to me that one way of dealing with costs, even in the fixed costs regime, is for an application to be made to the court in those circumstances.
>
> 8. The provisions of Rule 36.20 CPR and in particular Rule 36.20(2) provide that where a part 36 offer is accepted within the relevant period, the Claimant is entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 CPR commensurate with the stage applicable for the date on which the notice of acceptance was served. Part 45 CPR and the rules relating to fixed costs, set out in detail the costs and disbursements that the Claimant is entitled to in this case.
>
> 9. In those circumstances, applying by analogy the fact that this is a fixed costs case, the whole purpose of which is meant to avoid the necessity of a summary or detailed assessment of costs. In my judgement it was plainly in the contemplation of the Civil Procedure Rules Committee, who drafted the rules in relation to fixed costs and is in accordance with the Jackson Reforms, to ensure that the detailed assessment of costs was avoided in the circumstances.
>
> 10. In my judgment, I prefer the submissions of Mr. Hughes to those of Mr. Edmonson; as a consequence of that and considering the fact that the Part 36 offer was clearly made within the fixed costs regime, it is not open to the Claimant to draft a bill of costs and to use the standard procedure under Part 47.7 by serving a bill and thus increasing costs in proceedings where fixed costs were meant to apply."

Thus Mr. Batten was able to rely on this authority for the proposition that the Claimant had adopted the correct procedure in making the application before the court.

8. Mr. Dunne relied upon the contents of his skeleton argument and sought to distinguish *Mughal* indicating that it seemed that there was no real dispute about the costs in that

[4] The transcript of the hearing before DJ Davies commences at page 58 and the judgment at page 53.

case and that is concerned an 'accounting exercise'. He submitted that there could not be two concurrent routes to quantify costs. Giving the example of a multi-million pound case, he suggested that it would not be open to the Receiving Party in such a case to bypass the r.47.6 procedure by simply making an application. That would be an abuse. He submitted that the correct approach would be a detailed assessment of costs. Of course, this argument was predicated on the basis that there was a deemed costs order under r. 36.20 and the Claimant had a right to sign a bill of costs.

9. In his judgement District Judge Davis started with the above proposition and stated at paragraph 9:

> "On first blush, I must say that it seemed to me that the Defendant must be right that it is not open to a Claimant, even in a fixed or predictive costs regime, to make a free standing application to the Court and entirely bypass the procedure that applies to a detailed assessment where there is a dispute in relation to costs or disbursements"

He went on at paragraph 10 to pose a question

> "The question I have to deal with now is whether that first blush reaction has been displaced by the decision that I have been shown of Master Howarth in the Senior Court Costs Office in a case called *Sharon Mughal v Samuel Higgs and EUI Ltd*"

Having considered the decision and reminding himself that the decision was not binding upon him, District Judge Davies decided that the *Mughal* decision did not displace his initial reaction. Thus, he concluded at paragraph 15:

> "Stepping back, the decision of Master Howarth, which I have been describing, has not changed my initial reaction, which is that the appropriate method of making this sort of application is by way of a Notice of Commencement of detailed assessment proceedings. That is how disputes as to the amount of costs or disbursements are resolved. I can see nothing in *Mughal* which carves out –as it has been described in the course of argument – the fixed costs regime from that. I agree with the submission that the whole point of removing assessment procedures from the county courts was to ensure that these matters are dealt with in a consistent and timely manner in the Senior Court Costs Office and the [appropriate manner for] dealing with that is to proceed by way of commencement of detailed assessment proceedings which is subject to procedures and restrictions inherent in those proceedings."

And continued at paragraph 16;

> "I should say lastly, that I have been referred to both CPR 45.29 and 36.20(11). Neither of those rules, it seems to me, provide a mechanism whereby this sort of application can be made to the county court which was dealing with the underlying litigation. CPR 36.20(11) deals with the question of whether or not an order as to costs should be made in the first place. CPR 45.29(2) provides a specific procedure in different circumstances that is after the claim is started under Part 8 in accordance with Practice Direction 8B.

> That makes specific provision at 45.29(2), that either party may make an application for the Court to determine costs in that specific scenario. That being the case, if it was anticipated that the Court should carry out a similar exercise in a rather different scenario that is before me today, I would expect the rules to say so explicitly. They do not"

Thereafter he upheld the Respondent's submissions and dismissed the application, without considering the underlying issue as to whether the Claimant should have taken steps to invoke the Help With Fees scheme. Reading the above it is plain that the District Judge proceeded under the assumption that a deemed order did arise under Part 36. He looked for, and could not find, a 'carve out' that would mandate a different procedure. In absence of that procedure there was nothing to distinguish the operation of r. 36.20 from the rest of Part 36 and thus it should follow that procedure.

10. I recognise that an appeal is not a retrial of the issue before the lower court. I approach the matter on the basis that my role is limited and I am only entitled to interfere with the decision of the learned District Judge if I come to the conclusion that he misdirected himself as a matter of law, or insofar as he reached an incorrect conclusion in the exercise of a judgment or discretion. It is not for me to simply substitute my own decision. However, if I come to the conclusion that he did come to a conclusion which no other District Judge could have done after having directed themselves correctly as to the relevant law then I should allow the appeal.

THE JURISDICTIONAL ISSUE

11. The appeal in this respect proceeds on a single ground that the District Judge erred in law in finding that, where r.36.20 is engaged, a deemed order for costs arises, so that a dispute over recoverable disbursements can only be determined by serving a bill of costs and commencing detailed assessment proceedings. The Appellant argues that there is no such deemed order, thus no existing entitlement to commence assessment proceedings and therefore the receiving party has no option but to make an application for an appropriate order.

12. Before addressing that issue, Ms Ashraf raised a preliminary point pursuant to an undated Respondent's Notice.[5] She argued that District Judge Davies was not invited to decide that there was no deemed costs order, rather he was asked to decide that the Respondent should pay the disputed fee on the assumption that there was a right to the fee remission. It became clear that this seemingly innocent submission hid a significant concession, that the Appellant is correct in asserting that there was no deemed costs order under r.36.20. Thus, the Respondent's argument shifted from the points made to the lower court and now focussed on the form of the application.

13. Ms Ashraf characterised the application to the lower court as an order "compelling the Respondent to pay the disputed disbursements". She argued that the court below cannot be challenged on the basis that the Appellant lacked the authority required to commence proceedings as the Appellant had not raised this issue. She addressed me on the right to raise new points on appeal and referred me to the decision in *Jones v MBNA International Bank* [2000] EWCA Civ 514 where May LJ held at paragraph 52

[5] Respondent's Notice is found at [35]

> "Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are."

Ms Ashraf conceded that the above authority did not completely close the door to new issues being raised and that the passage included the following:

> Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed. But in my view this is not such a case.

She argued that there was nothing exceptional in the instant case such as would allow the Appellant to raise new arguments. As counsel acknowledged, matters have now moved on with the decision in *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337. She referred me to paragraph 26 of the decision, however I gain assistance from the two subsequent passages in the judgment. Together they read:

> 26. These authorities show that there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.
>
> 27. At one end of the spectrum are cases such as *Jones* in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As Peter Gibson LJ said in *Jones* (at [38]), it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances; but as May LJ also observed (at [52]), there might nonetheless be exceptional cases in which the appeal court could properly exercise its discretion to do so.
>
> 28. At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court: see e.g. *Preedy v Dunne* [2016] EWCA Civ 805 at [43]-[46]. In such a case, it is far more likely that the

> appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime.

Relying on *Walsham Chalet Park Ltd v Tallington Lakes Ltd* [2014] EWCA Civ 1607 and *Glatt v Sinclair* [2013] EWCA Civ 241 Ms. Ahraf submitted that it would still be unjust to allow the Appellant to raise the issue.

14. In his skeleton argument Mr. Morris suggested that the jurisdictional point was not a new issue and that the preliminary point had no merit. He suggested that the application was one for payment of costs and that this involved a first decision that the Claimant was entitled to the costs and then a second decision that the costs were reasonably incurred. Thus, the application did ask for the relief that the Claimant now seeks.

15. There are two answers to Ms Ashraf's submissions. The first is that, on a true analysis, the application did seek a costs order and engaged the issue as to whether a Part 23 application was the appropriate route to that order. Ms Ashraf accepted my formulation that the process by which a party obtains an enforceable costs order is three fold; firstly the receiving party must have a right to costs, secondly they should obtain an order for costs and thirdly they have that order quantified by way of assessment. During submissions she accepted that the wording of the draft order in the application included the words "the Defendant do pay….". She conceded that this was an application for an order for costs and that the second half of the sentence "…the issue fee in the sum of £455.00 in 14 days" was quantification. As such the application elided the two stages but nevertheless these were the matters before the court. Thus the court was being asked to decide whether the Claimant had a right to costs, and on what basis.

16. Any analysis of the hearing before District Judge Davies demonstrates that the whole basis of the Respondent's opposition to the application was that there was a deemed order made under Part 36.[6] This was contested by the Claimant relying on the *Mughal* decision. Ms Ashraf also accepted that the transcript showed that the issue before District Judge Davies was precisely the method by which one invoked such an order. I do have some sympathy with Ms. Ashraf to this extent. Matters were so rushed before District Judge Davies that neither party had a real opportunity to the expand their arguments as they have before me. In truth the arguments before District Judge Davies were a bare skeleton of the developed cases advanced before me. Faced with this analysis Ms. Ashraf accepted that there was little in the preliminary point. Thus I did not trouble Mr. Morris on the issue

17. The second answer to the preliminary point is that, if pressed, I would have permitted the Appellant to advance the argument, if it was novel. In doing so I refer to *Notting Hill* and the fact that a case does not have to be exceptional to admit new points. Naturally, the court has to be cautious before it does permit fresh arguments. On the spectrum identified in *Notting Hill* this is a matter of pure law of the type identified in paragraph 28. It is a matter which was broadly before the lower court and the *Mughal* decision was on point although it does not tease out the issue to the extent that was

[6] Thus, paragraph 5 of the Defendant's skeleton before the lower court, asserted that there was a deemed costs order. That basic proposition was developed at paragraph 7 with the line, "Where, as here, a party has issued proceedings and has a deemed order for costs there is no right to make a stand-alone application to the court for an order in respect of payment of any particular items claimed." [76]

advanced before District Judge Davies. As such, the arguments before me were not entirely novel and were a refinement of the points advanced before District Judge Davies. Where a new argument is a development of issues raised before the lower court, it is more likely that the Appellate court will permit those developments to be included in the submissions. It seems to me that these observations have particular traction when the proceedings below were so rushed in the ill considered attempt of counsel to push the application through. I would also take into account the fact that the Respondent had ample notice of the point and has responded to it. It is also relevant that there was no indication prior to service of the Respondent's skeleton that the jurisdictional point was being taken. Finally I would take into account that the Respondent actually conceded the rectitude of the Appellant's case in this respect and it would be artificial to dismiss an appeal where both parties agree that the underlying assumption in the case, namely that there was a deemed order, was flawed.

18. For these reasons there is nothing in the preliminary point. It also means that the Respondent has largely conceded the first issue on the appeal. However, I am conscious that the analysis that has led to this conclusion needs to be spelt out so as to clarify an issue that has been causing some conflicting decisions at first instance.

19. Mr Morris submitted to me that the District Judge fell into error because he assumed that the Appellant had a deemed order for costs and thus a right to commence detailed assessment proceedings. The Judge arrived at this conclusion because he could not find a 'carve out' that would displace the usual deemed order under r. 36.13. Mr. Morris argued that there is a carve out and one that prevents the deemed order arising. He conceded that a deemed order is made following an accepted offer under r.36.13 for cases outside the fixed costs regime. He pointed out that Part 36 identifies the consequences of acceptance but does not make a deemed order. That arises by operation of r.44.9. This is what District Judge Davies had in mind during the hearing before him.

20. In Mr. Morris's submission r.36.20 operates in a wholly different way. He pointed out that the general provisions in r.36.13 were displaced in favour of 36.20 and that the authority of *Hislop v Perde* [2018] EWCA 1726 confirms that this this is the case. Mr. Morris argued that, unlike the general approach in r.36.13, the fixed costs regime operates differently. R.36.20 not only provides for the consequences of acceptance, it quantifies those costs by reference to the appropriate Table 6. Thus, insofar as one is deciding the costs there is no scope for argument. Mr. Morris says the costs position has to be distinguished from the situation in relation to disbursements because the court does retain a discretion in relation to them. This is because r.45.29I addresses the disbursements in a fixed costs regime and permits a discretion. In conclusion Mr. Morris says that the fixed costs regime is carved out of the usual Part 36 regime, there is no deemed costs order, there does not need to be one on the basis that there is no discretion save in relation to disbursements. Because there is no deemed costs order the procedure under CPR 47.6 cannot apply and the Claimant has no alternative but to apply under r.23.

21. That brief summary does not do full justice to Mr. Morris's arguments which inform my decision.

DISCUSSION

22. It is necessary to commence with some basic propositions. First it is important to recognise that the process of turning a costs application into an enforceable order for costs involves the three state process identified above. First a party must have a right to costs. This may arise under r.44.2 by success in litigation or by operation of the rules, particularly r.44.9 which operates to deem an order in certain circumstances, commonly where there is discontinuance or acceptance of a Part 36 offer. The second stage is that the right to costs is reduced into a costs order either by deeming such an order or a judge making such an order. Finally, the order for costs must be quantified by an assessment of costs or by operation of a fixed costs regime under Part 45.

23. It follows that a party must have a right to commence the assessment proceedings. Without that right there is no authority to assess costs summarily or invoke the detailed assessment procedure under r.47.6, as is made clear by the table in r.47.7.

24. In my judgment Mr. Morris is right to start with the general situation under Part 36 and then to address the issue posed by District Judge Davies as to whether there is an exception for the fixed costs regime.

25. The consequences of acceptance of a Part 36 offer are spelt out by CPR 36.13 which provides:

> **Costs consequences of acceptance of a Part 36 offer**
> 36.13—(1) Subject to paragraphs (2) and (4) and to rule 36.20, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror.
>
> (Rule 36.20 makes provision for the costs consequences of accepting a Part36 offer in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol.)

As Mr. Morris pointed out, this simply provides for the costs consequences that flow from the acceptance of the part 36 offer. It does not make any order and thus there is no right to commence assessment proceedings. The right to commence proceedings is provided by r.44.9 which provides:

> **Cases where costs orders deemed to have been made**
> 44.9 —(1) Subject to paragraph (2), where a right to costs arises under—
> (a) rule 3.7 or 3.7A1 (defendant's right to costs where claim is struck out for non-payment of fees);
> (a1) rule 3.7B (sanctions for dishonouring cheque);
> (b) rule 36.13(1) or (2) (claimant's entitlement to costs where a Part 36 offer is accepted); or
> (c) rule 38.6 (defendant's right to costs where claimant discontinues),
>
> a costs order will be deemed to have been made on the standard basis.

Hence the right to a costs order identified in CPR 36 is turned into an order, and a right to commence assessment by operation of r.44.9. Following through the three stage

process that I have identified, the right to commence detailed assessment triggers the provisions of CPR 47.6. Under the usual Part 36 procedure there is a seamless transition by operation of the rules from the acceptance of a Part 36 offer through to the right to commence the assessment proceedings. This brings one to the question posed by District Judge Davies as to whether there is a 'carve out' for fixed costs that would require a departure from a deemed order leading to a detailed assessment of proceedings.

26. It is immediately obvious from the wording of r. 36.13(1) that a different approach is taken to the fixed costs regime because the whole operation of r.36.13 is made subject to r.36.20. Thus, for cases falling within r.36.20 one must apply that rule. R.36.20 provides:

> **Costs consequences of acceptance of a Part 36 offer where Section IIIA of Part 45 applies**
>
> 36.20 —(1) This rule applies where—
>
> (a) a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1); or
> (b) ….
>
> (2) Where a Part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror.
> (3) ……
>
> (10) Fixed costs shall be calculated by reference to the amount of the offer which is accepted.
>
> (11) Where the parties do not agree the liability for costs, the court must make an order as to costs.
>
> (12) Where the court makes an order for costs in favour of the defendant—
>
> (a) the court must have regard to; and
> (b) the amount of costs ordered must not exceed, the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 applicable at the date of acceptance, less the fixed costs to which the claimant is entitled under paragraph (4) or (5).
>
> (13) The parties are entitled to disbursements allowed in accordance with rule 45.29I incurred in any period for which costs are payable to them.

Thus CPR 36.20 creates a regime whereby the Claimant has an entitlement to costs and quantifies those costs in accordance with Tables 6B to 6D. What it does not do is to perform the r.44.9 function of deeming a costs order in favour of the Claimant. Because the costs are fixed, there is no requirement for an assessment of costs and thus no

prerequisite of a deemed costs order. Some support for that proposition is provided by r. 36.20(11) which makes it explicitly clear that the court retains a discretion to make a costs order and envisages a situation where the costs order will be in favour of the Defendant. In this respect I depart from the analysis of District Judge Davis. He commented that the rule merely "deals with the question of whether or not an order as to costs should be made in the first place". If, as he found, there was no carve out, and a deemed order arose under Part 36, then there would no requirement for CPR 36.20(11) because an order would have been made by operation of the rules. This provision marks a distinct departure from the situation provided for under r.36.13. Instead of a seamless progression from acceptance to order, the rule specifically reserves to the court a right to make a costs order in certain circumstances. It seems to me that the inclusion of r.36.20(11) is inconsistent with a deemed costs order being made. In relation to the profit costs element the rule provides predictable costs for both the Claimant and by virtue of 36.20(12) some degree of predictability for the Defendant. However the words 'have regard to' and 'must not exceed' in r.36.20(12) may be taken to suggest that there is an element of discretion afforded the court when considering the quantum of any Defendant's costs order. In my judgment this is a first discretionary element in an otherwise fixed costs regime. What the rule does not provide is any mechanism for how a Defendant would bring their application for costs before the court.

27. The second discretionary element arises in relation to disbursements and is directly relevant to this appeal. R.36.20(13) specifically permits the parties to recover disbursements in accordance with r. 45.29I. This provides:

> **Disbursements**
> 45.29 I—(1) Subject to paragraphs (2A) to (2E), the court—
> (a) may allow a claim for a disbursement of a type mentioned in paragraphs (2) or (3); but
>
> (b) will not allow a claim for any other type of disbursement.
>
> (2) In a claim started under the RTA Protocol, the EL/PL Protocol or the Pre-Action Protocol for Resolution of Package Travel Claims, the disbursements referred to in paragraph (1) are—
> (a) ……
> (d) court fees;….
> (h) any other disbursement reasonably incurred due to a particular feature of the dispute.

It is apparent from the wording of r. 45.29I(1) that there is an element of discretion. I note the contrasting use of the words 'may' and 'will' in the two subsections. Thus, a further element of discretion is afforded the court by the operation of r. 36.20 and r. 45.29I. Accordingly, my analysis of r.36.20 leads to the conclusion that there is no costs order made under r.36 in a fixed costs case. Hence the Claimant or Defendant seeking to invoke the court's costs jurisdiction must do this by operation of an application under r.23 as envisaged by r.36.20(11).

28. Mr Morris has relied upon an alternative approach which derives from the wording of r.44.9. This deems the order for costs which arise from costs arising under r.36.13. He pointed out that the wording of r.44.9(b) specifically makes no reference to 36.20 but does refer to 36.13. Because fixed costs under r.36.20 are specifically excluded from

r.36.13, and because r.44.9 only refers to r.36.13 there is no deemed costs order in relation to fixed costs under Section IIIA. In my judgment this analysis cannot be faulted.

29. By either of these routes it can be seen that there is no deemed order made in the fixed costs regime and the exception that District Judge Davies looked for does exist. In these circumstances the appropriate course is to make an application in accordance with r.23 in cases to which Section IIIA applies. Thus, the provisions of r.47.6 are not open to either a Defendant seeking their costs under r.36.20(11) or either party seeking their disbursements under r.36.20(13). Accordingly, as Master Howarth found in *Mughal*, the only avenue open to a party seeking to invoke the discretion of the court in cases to which Section IIIA applies is to make an application under r.23 as the Claimant did in this case.

30. It follows that this is not, as the Respondent suggested, an attempt to obtain an assessment of costs 'through the back door'. Plainly where there is an authority to assess costs then, in accordance with r.47 that procedure should be followed. Where there is no authority then the only route is Part 23. The Respondent's argument in this respect failed to recognise that the Appellant was asking for two forms of relief, a costs order and then an assessment of costs. It would have been open to District Judge Davies, faced with this application, to have made a costs order and then referred it to a detailed assessment. Given the novel arguments over recovery of the court fee, that order might have been made in this case. I suggest later that the normal course will be to proceed to a summary assessment.

31. In these circumstances I allow the appeal from the decision of District Judge Davies' order of the 15th April 2019. Before turning to the consequences of that decision, I would wish to make some comments on the form of application in cases that invoke the discretion of the court in relation to Section IIIA.

FORM OF APPLICATION

32. I refer to the preliminary point made by Ms. Ashraf. That argument was, in part, generated by the form of the application made in this case. While Ms. Ashraf accepted that it did raise the appropriate issues, the application could have been expressed more clearly. A proper consideration of the three stage process I identified above suggests that, if a party seeks to invoke the discretion of the court under r.36.20 that the application should seek two separate forms of relief. Paragraph one of the application should seek an order for costs in favour of the applicant. The second paragraph should ask for the costs to be assessed in accordance with the sum sought by the party. In order to avoid further difficulties, it would be prudent if the application exhibited a Form N260 (statement of costs), or at least the disbursements page where disbursements only are sought. Thus compliance with the indemnity principle would be confirmed by the signature on the form.

33. Once the court has decided to award the costs under paragraph 1 of such an application, paragraph 8.3 of PD44 is engaged and the court will have to decide whether to summarily assess the costs or order a detailed assessment. I would expect that, save in exceptional cases where there is some complexity or point of principle, there will be a summary assessment.

THE SECOND ISSUE: THE HEARING FEE

34. District Judge Davies did not decide this issue having disposed of the application on the first limb. The parties are both agreed that it might produce clarity if I proceed to decide the hearing fee issue without remitting the case back to the District Judge. I accede to the request. The issue is whether it is reasonable for a Claimant who is, or may be, eligible for fees exemption to forego that benefit and incur the cost of the hearing fee, passing it on to the Defendant as part of the costs of the action.

SUBMISSIONS

35. Before District Judge Davies both parties filed skeleton arguments which focussed on the reasonableness of foregoing fee remission.

36. For the paying party (the Respondent) Mr Dunne outlined the factual background namely that the Appellant was unemployed and prima facie would be eligible for fee remission. Mr. Dunne pointed out that the Respondent had not refused to pay the hearing fee but raised a query as to whether the Appellant could and had benefitted from the fee remission scheme. This query has not been answered. Bearing in mind that there was, as far as I am aware, no schedule of costs signed with a certificate as to the indemnity certificate, that query was legitimate and I cannot see why a party, properly applying their minds to the overriding objective, refused to answer it.

37. Mr Dunne submitted that the Civil Procedure Fees Order 2004 lists the criteria for fee remission and specifically excludes those in receipt of Legal Aid. Thus, by necessary inference there is no exclusion for those who can fund their case by an alternative method such as a CFA or BTE insurance. As Mr. Dunne submitted, "Had Parliament wished to exclude whole swathes of litigants who fund their cases through BTE or ATE then the SI would have included these classes of persons within the excluded groups. It does not".[7]

38. Mr. Dunne's skeleton argument also relied on the proposition that, on an assessment of costs, the paying party will only be required to pay costs reasonably incurred in the conduct of the litigation. He cited *Friston on Costs* (3rd Ed) at 52.97:

> "Receiving parties who were on state benefits at the material time may not have been required to pay court fees. If that was the case, the court may disallow the fee on the grounds that it was not reasonably incurred."[8]

It was argued that the extract supported the proposition that one approaches the issue of the court fees untrammelled by considerations of mitigation of loss but simply applying the principles found in r. 44.3, that the court will not allow costs which have been unreasonably incurred or are unreasonable in amount. The core of the Respondent's argument as paying party is that, where a Claimant can avail themselves of fee remission, it is unreasonable to incur the fee and then seek to pass it on to the Defendant. By simple operation of r.44.3 and 44.4 the sum should be disallowed as unreasonably incurred.

[7] Paragraph 19 of the Defendant's skeleton – [77 &78]
[8] Paragraph 20 of the Defendant's skeleton – [78]

39. Making good his submissions Mr. Dunne argued in his skeleton that there was clearly a doubt about the issue of whether the court fees were unreasonably incurred and, this being a standard basis assessment, the burden lay on the Claimant / Appellant to satisfy the court as to reasonableness. As they have failed to do this, they should not recover the fees.[9]

40. Ms Ashraf adopted these arguments but developed them further, arguing that there was body of case law that would support the Respondent's case that the solicitors should utilise the benefits afforded by the state. She referred me to the decision in *Surrey v Barnet and Chase Farm Hospitals NHS Trust* [2018] EWCA Civ 451. The facts of that case were that the Claimants had switched from legal aid funding to conditional fee agreements and ATE insurance. The Court of Appeal held that it was not reasonable for the Claimants to have foregone the benefits of legal aid for an alternative model. Based on *Surrey* Ms. Ashraf argued that this was authority for the proposition that, where there is a state funded regime and the court was assessing costs under rr.44.3 and 44.4, it might be unreasonable for the Claimant to forego the benefits of a state funded scheme in favour of a more commercial model that increased the burden of costs on the paying party. She relied on the fact that *Surrey* is a costs case directing itself to the issue of the assessment of costs, unlike the cases relied upon by Mr. Morris for the Appellant. She further argued that the tortfeasor is entitled to suggest that public funding was available and that it was unreasonable not to utilise it. In her words "if there is a lower costs regime available to the Claimant, why should the tortfeasor pay more?"

41. For the Appellant Mr. Morris adopted the skeleton argument of James Batten who prepared the case before DDJ Davies. He focussed on the issue as one of mitigation of loss, which marked a significant departure from Ms. Ashraf's analysis rooted in the CPR. It was argued that the incurring of the court fee was not a failure to mitigate loss because the cost behind the court fee is still incurred. In the Appellant's submission the real issue is not mitigation but who should bear the burden of the fee, the tortfeasor on the one hand or the state on the other. The notion that there was no cost where fee remission applied, is misconceived. There is still a cost to the state where parties litigate, the issue is who bears that cost?

42. He argued that a successful Claimant is not required to recover from others sums that they may be liable to pay. In the Appellant's submission the Claimant has a broad degree of liberty in choosing from whom they recover their losses. In this respect Mr Morris relied on the decision in *Peters v East Midlands Strategic Health Authority* [2010] QB 48. Unlike *Surrey* the case did not concern an assessment of costs but rather the quantification of a care claim. In that case the Defendant argued that since the claimant had a statutory right to have her care and accommodation provided by the local authority she could not recover those costs from the defendants because she had suffered no loss. At paragraphs 53 and 54 the court said:

> "53. Having reviewed these authorities, we can now express our conclusion on this issue. We can see no reason in policy or principle which requires us to hold that a claimant who wishes to opt for self-funding and damages in preference to reliance on the statutory obligations of a public authority should not be entitled to do so as a matter of right. The claimant has suffered loss which has been caused by the

[9] Paragraph 23 of the Defendant's skeleton – [78]

> wrongdoing of the defendants. She is entitled to have that loss made good, so far as this is possible, by the provision of accommodation and care. There is no dispute as to what that should be and the council currently arranges for its provision at The Spinnies. The only issue is whether the defendant wrongdoers or the council and the PCT should pay for it in the future.
>
> 54. It is difficult to see on what basis the present case can in principle be distinguished from the case where a claimant has a right of action against more than one wrongdoer or a case such as *The Liverpool (No 2) [1963] P 64* where a claimant has a right of action against a wrongdoer and an innocent party. In *The Liverpool (No 2)* , those two cases were treated alike. In our judgment, the present case should be treated in the same way. It is true that in the present case, the claimant's right against the council is the statutory right to receive accommodation and care. But the fact that there is a statutory right in the claimant to have his or her loss made good in kind, rather than by payment of compensation, is not a sufficient reason for treating the cases differently. "

At paragraph 89 Dyson LJ added:

> "89. There is much to be said for the view that it is reasonable for a claimant to prefer self-funding and damages rather than provision at public expense, on the simple ground that he or she believes that the wrongdoer should pay rather than the taxpayer and/or council tax payer. In other words, it is not open to a defendant to say that a claimant who does not wish to rely on the state cannot recover damages because he or she has acted unreasonably."

Mr Morris argued that the principles behind the award of damages and incurring of the court fee were indistinguishable. In both cases there are two parallel regimes. Under one, the state will bear the cost, under the other the tortfeasor would bear the cost. He submitted that *Liverpool (No2)* was plain authority for the proposition that the Claimant could elect which regime to follow and that it would be wrong in principle for the Claimant to suffer as a result of that election. It is said that the same principle is found in *London Building Society v Stone* [1983] 1WLR 1242 at 1262 A-C.

43. In the Appellant's submission there is further support for this proposition, if one considers cases where the Claimant had relevant insurance which might defray the loss sustained. He referred to *Bee v Jenson (No.2)* [2007] All ER 791 at paragraph 9:

> "Ever since *Bradburn v Great Western Railway* [1874] LR 10 Exch 1] defendants have to accept that a claimant's insurance arrangements are irrelevant and cannot be prayed in aid to reduce their liabilities"

In Mr. Morris's submission it is plain that that the successful Claimant can look to the tortfeasor and there is a common theme that applies equally to state provision, insurance and even benevolent contributions as was explained in *Parry v Cleaver* [1970] AC 1 in which Lord Reid stated:

> "It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrongdoer. We do not have to decide

> in this case whether these considerations also apply to public benevolence in the shape of various uncovenanted benefits from the welfare state, but it may be thought that Parliament did not intend them to be for the benefit of the wrongdoer.
>
> As regards moneys coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor."

Thus, Mr. Morris submitted there is a strong jurisprudential basis for arguing that the consequences of a tortfeasor's wrong doing should be visited on them and not some collateral source of funding.

44. Mr. Morris further submitted that, for policy reasons, it was wrong for a party who had no entitlement to fee remission, namely the tortfeasor, to benefit from fee remission. The purpose of the fee remission scheme is to guarantee access to justice for those who could otherwise be prevented by court fees from issuing a claim. He submitted that it would be bizarre for a Claimant with less than £3000 in savings[10] to benefit from fee remission when he had an alternative means of paying. Expanding on this submission Mr. Morris argued that the purpose of fee remission is not to limit the costs payable by a tortfeasor after a legitimate and successful claim. In his submission this is doubly so when the effect would be to reduce the amount of money available for the justice system given the rationale for the fees structure. The purpose of the scheme is not to subsidise tortfeasors from the public purse, at the expense of the system as a whole.

45. Turning to the facts of this case, it is argued for the Appellant that the Claimant had BTE insurance which covered costs including fees. Mr Morris also argued that applying for fee remission took time and that had an additional cost which was likely to fall on the solicitor and which was not contemplated when the fixed cost regime was set up. He further submitted that it was not unreasonable for the Claimant to utilise his insurance as opposed to the fee remission scheme. Mr. Morris painted the fee remission scheme as complex and difficult to predict and that the highest that the Defendant could put the case was that a Claimant *may* be eligible.

46. Finally Mr Morris argued that the burden was on the Defendant to show that the Claimant had unreasonably failed to mitigate loss and they failed to do that.[11]

DISCUSSION

47. The first issue for consideration is where the burden of proof lies in relation to the contested issue of the hearing fee. It will be appreciated that Mr. Morris approached the issue as one of mitigation and thus submitted that the burden of proof lay on the Respondent to show that the Appellant had failed to mitigate his loss. Ms. Ashraf disagreed and approached the burden of proof as that which applied to the assessment

[10] The capital limit for full fee remission under the Help With Fees scheme

[11] I am conscious of the conflicting first instance decisions of Deputy District Judge Jones in *Cook v Malcolm Nichols Ltd* [unreported Coventry County Court– 11th April 2019] and District Judge Jenkinson in *Stoney v Allianz Insurance PLC* [unreported Liverpool County Court – 7th November 2019]. Neither case raises any additional points other than to make the uncontroversial point that the hearing fee is a solicitor's disbursement.

of costs. On that basis, it is for the Appellant, as receiving party, to show that his approach was not unreasonable.

48. In resolving this issue, I return to my decision on jurisdiction. I have decided that the appropriate approach to this dispute is to issue a part 23 application seeking (a) an order for costs and (b) an assessment of those costs. Accordingly, in deciding whether to award the hearing fee the court is primarily assessing costs. The regime for such an assessment is comprehensively provided for in the rules, particularly at CPR r.44.3 which provides;

> 44.3 —(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs—
>
> (a) on the standard basis; or
>
> (b) on the indemnity basis,
>
> but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.
>
> (2) Where the amount of costs is to be assessed on the standard basis, the court will—
>
> (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
>
> (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.
>
> …
>
> (3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

This rule makes it clear that the burden of proof on a standard basis assessment lies on the receiving party to satisfy the court that the costs were reasonable and proportionate. I take into account that this is a statutory regime enshrined in the rules and that the rule engages similar issues to those involved in mitigation of loss arguments. In my judgment it is plain that this statutory regime is drawn in mandatory terms and which applies to the assessment of costs. The court is assessing costs in deciding the fees issue. Thus, I agree with Ms. Ashraf that the burden of proof on the fees issues lies on the Appellant to satisfy me that it was not unreasonable to forego the fee remission scheme.

49. I can dispose of a number of Mr. Morris's arguments relatively quickly. I cannot see that the unpredictability or burden of applying for fee remission would afford the Claimant any reason for failing to make the application in most cases. The whole basis of the fee remission scheme is that it should be accessible to litigants of modest means to afford access to justice. As such it is designed to be used by litigants in person who have no legal representation. Hundreds of people of limited means successfully navigate the forms and the required information on a daily basis and receive fee remission. There is no reason to believe that a requirement to make the application for

fee remission would represent an unreasonable burden on the Claimant. Nor is there any reason why they could not be expected to make this application themselves. Thus, I do not see that the inherent characteristics of the fee remission scheme render it unreasonable to expect an application to be made. Seen in this light the argument that the scheme is unpredictable has no foundation. The answer is that an application can be made and the Claimant will then find out if they were eligible. All that has to be done is an application has to be made in good time. I can see that there will be exceptional circumstances, for example where a firm is instructed shortly before the limitation period, where it would be reasonable to conclude that the unpredictability, the information required and the time that this takes might render it reasonable to incur a hearing fee. However, such cases will be unusual.

50. The core argument is whether it is reasonable to expect a Claimant to use the scheme or alternatively whether this places a burden on the taxpayer that is unreasonable. In this respect I agree with Mr. Morris that there is a loss where fee remission is utilised. The public purse is depleted by the amount that would otherwise have been paid. On this basis there is less in the public purse to devote to the justice system as a whole. Thus, any suggestion that there is not loss where fee remission is utilised is misconceived. I am satisfied that Mr. Morris is right to characterise the dispute as over who bears the loss, the public purse or the tortfeasor.

51. In accordance with r.44.4 the court will have regard to all the circumstances in deciding whether costs were reasonably and proportionately incurred and the funding model may be relevant as it was in the case of *Surrey* relied upon by the Respondent. However, I have reservations about the Respondent's reliance on the *Surrey* decision. Mr. Morris was taken by surprise by Ms. Ashraf's reliance on this case and had not had an opportunity to consider it at any length. Nevertheless, he helpfully distinguished the *Surrey* case from the instant case. The focus of *Surrey*, and the two other cases decided at the same time, is on the advice that the Claimant received in deciding to opt for a CFA based funding model abandoning the legal aid funding. The court found that the advice given to the client in the *Surrey* case was potentially seriously misleading, concluding:[12]

> "60 The bottom line is that in each of the three cases the advice given to the client had exaggerated (and in two cases misrepresented) the disadvantages of remaining with legal aid funding; and had omitted entirely any mention of the certain disadvantage of entering into a CFA. Moreover, one of the advantages of entering into the CFA was Irwin Mitchell's own prospective entitlement to a substantial success fee. In those circumstances I consider that District Judge Besford was correct in saying at para 81: "Where one of two or more options available to a client is more financially beneficial to the solicitor, the need for transparency becomes ever greater."

Thus, the focus in *Surrey* was not on the reasonableness of incurring additional costs through a change of funding regime, but the effect of unreasonable advice and whether this vitiated the decision rendering it unreasonable. The ratio was that:

[12] *Surrey* – 5842 at paragraph 35, a similar point was made on the facts of *AH*, decided at the same time, in paragraph 38 and finally there were reservations in relation to the advice given in the third of the cases tried together, *Yesil*, at paragraph 43.

> A relevant factor in the reasonableness of the receiving party's choice to incur costs was the advice that he had received, which might compromise the reasonableness of that choice if it was not sound and if it was the reason why the party had chosen to incur the costs; that where a receiving party had decided to switch from legal aid funding to a conditional fee agreement for a mix of good and bad reasons and some clear disadvantages to that party of making the switch had not been explained to him by his legal representative, the burden was on the receiving party to satisfy the costs judge that even if the bad reasons had not been put forward and the disadvantages had been properly explained he would still have made the same choice.[13]

This demonstrates that *Surrey* is not authority for any proposition that the Claimant must adopt the cheapest model for the funding of the case. It is concerned with the reasonableness of advice, especially where the solicitor stands in a fiduciary role vis a vis the client. Indeed, *Surrey* left open that it might be reasonable for a party to change their funding model to a CFA if the advice was sound.[14] To that limited extent, the authority contemplated it might be legitimate to adopt a more costly funding scheme in appropriate circumstances. As such it did not assist the Respondent's argument.

52. Ms Ashraf was on stronger ground in referring me to *Friston* and to the Civil Procedure Fees Order 2004. There is no doubt that those who drafted the fees order did identify one source of funding, namely legal aid, but made no mention of insurance based funding or CFAs. I approach the matter on the basis that counsel was correct to suggest that there is nothing inherent in the regime to debar a Claimant from successfully using it. I am not sure that I am greatly assisted by the short extract from *Friston*. On a true analysis the extract assumes that the receiving party has not paid the court fee, as is demonstrated by the phrase "if that was the case…". Accordingly it is directed to the operation of the indemnity principle, namely that a receiving party who does not pay the issue fee cannot recover it as a disbursement. Alternatively, it does no more than state the general proposition that a party who unreasonably incurs a disbursement may not recover it. It leaves open the corollary that, depending on the facts of the case, they may recover it.

53. Ms. Ashraf had to concede that there was nothing in the fee remission scheme that required its use by an eligible Claimant. The wording of the scheme did not inevitably lead to the conclusion that it was reasonable to place the burden of the cost of the court fee on the state. The other side of the balance is represented by the case law upon which Mr. Morris relied. I find it significant that there is a body of case law from the appellate courts that have examined different aspects of the issue. In my judgment *Peters* provides some considerable assistance. That case was concerned with a party who could defray their 'care loss' on the state and yet chose to visit it on the Defendant. Of course, the court held that it was not unreasonable to take that course and thus the tortfeasor was liable.

54. Ms. Ashraf submitted that the two situations were not analogous in that *Peters* concerned damages, whereas the decision for me concerns the assessment of costs.

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[13] *Surrey* – 5846 at paragraph 51

[14] Though not cited to me, I am conscious that court in *AB v Mid Cheshire Hospitals NHS Foundation Trust* [2019] EWHC 1889 (QB) upheld just such a finding that it was reasonable to alter funding from legal aid to a CFA where the advice was reasonable. The court specifically distinguished *Surrey* on the facts.

That is a fair submission and engages a decision that I have already identified, namely that the burden of proof is different on a standard based assessment as opposed to mitigation of loss. Ms Ashraf has not identified any other relevant factor distinguishing damages from costs. Accordingly, I have asked myself whether the reversal of the burden of proof is sufficient to disapply the *Peters* decision. In my judgment it is not. The difference between the cases is merely where the burden lies. *Peters* was not a case which turned on a fine point that the Defendant had failed to discharge a burden of proof. Rather it engaged the simple proposition that it was not reasonable to depart from the general rule in *The Liverpool (No 2)* namely that an innocent party can elect to pursue the tortfeasor where he has two potential avenues of recompense. Of course the passage in Dyson LJ's judgment at paragraph 89 of *Peters* directly addressed the issue that it is not unreasonable for a Claimant to believe that the wrongdoer should pay rather than the taxpayer and/or council tax payer.

55. I am fortified in this conclusion by the similarity of approach in relation to gratuitous assistance to the Claimant or insurance based funding examined in *Parry* and *Bee v Jenson*. Those decisions roundly rejected the notion that the tortfeasor could obtain a benefit from the arrangements that the Claimant had in place. The truth is that these decisions present something of a hurdle for the Respondent. Unless the Respondent can distinguish the hearing fee position from the damages position then *Bee v Jenson* and *Parry* are binding authority for the fact that the Claimant could pass on the cost even though he had insurance or gratuitous assistance. It follows that unless one can distinguish the insurance position from the fee remission position, then the rationale of the insurance based cases would travel through to fee remission cases. The Respondents have not sought to make such a distinction and thus it is difficult to see why a logic that applies to a Claimant who has alternative sources of funding, whether it be state (*Peters*), insurance (*Bee v Jenson*), another gratuitous source of funding (*Liverpool No.2*) or gratuitous support (*Parry*) should be different. These cases represent a formidable body of case law that allows the Claimant to legitimately elect to make their claim against the tortfeasor as opposed to relying on alternative sources of funding. Ms. Ashraf has not been able to suggest any fundamental distinction that would lead to a diametrically different decision where the loss is represented by a hearing fee as opposed to a head of damage.

56. Thus while the fees order does not exclude commercial funding, the above jurisprudence does suggest that it is not unreasonable for the Claimant to pass the costs of wrongdoing onto the wrongdoer.

57. This answers a further potential objection to the Claimant's position, namely that their argument would produce an arbitrary result. Some claimants will avail themselves of fee remission and the Defendant will not be required to reimburse this. Others will seek to pass on the payment to the tortfeasor. The thrust of the case law to which I have referred is that the Claimant has an election as to who to recover from and this is no more than one of a number of individual characteristics that arise in any assessment of damages and costs.

58. An alternative approach adopted by Mr. Morris was to argue on public policy grounds that it is wrong for the tortfeasor to obtain a windfall from the fact that the Claimant is fees exempt. That is not the purpose of the fees exemption scheme. I have some sympathy with that argument. I have already identified this issue as who bears the loss, the state or the wrongdoer. There is some support in the caselaw for the notion that it

is not unreasonable for the Claimant to visit on the tortfeasor the consequences of their misdeed. That is certainly the thrust of paragraph 89 of *Peters* and was expressed in more robust terms in *Parry* in the extract of Lord Reid's judgment:

> "It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrongdoer.

This engages the very public policy issues that Mr. Morris relied upon in submissions. Accordingly, I would agree that there are strong public policy grounds for saying that it is not unreasonable for a Claimant to preserve the public purse and direct the cost of wrongdoing on the tortfeasor. These are relevant considerations to an assessment of reasonableness under rr. 44.3 and 44.4.

59. By either of these routes I am satisfied that it is not unreasonable for the Claimant to pass on the hearing fee to the Defendant and, subject to me being satisfied that the fee was in fact incurred, I would award it pursuant to my power under r.45.29I. Of course, there are no issues of proportionality as the amount of the fee is fixed by law.

THE ORDER

60. In the above circumstances I allow the appeal and I will order the Defendant to pay the hearing fee subject to the formalities set out below being complied with.

61. It is my intention to hand down this judgement on the date indicated in the headnote. The attendance of the parties is excused. The matter will be relisted to consider any ancillary matters including the assessment of the hearing fee and time shall run from that hearing. At the hearing I will need to be satisfied that there is no breach of the indemnity principle and thus a Form N260 will be required for that hearing. Because this is a disbursement only issue, I am content that this is just the last page of the form proper which will include the disbursement and the signature. At the hearing I will also consider the position of the Claimant in relation to the redacted letter. I will circulate a draft order with the draft of this judgment.

62. It only remains for me to thank Mr. Morris and Ms. Ashraf and their colleagues for their assistance.

Proposed draft order at the handing down hearing:

Case No: C64YM383

IN THE CENTRAL LONDON COUNTY COURT
(On Appeal from a decision of District Judge Davies dated 15th April 2019)

Between :

PANAYOT IVANOV — Appellant
- and -
STEVEN LUBBE — Respondent

ORDER

Before HHJ Lethem

UPON hearing counsel for the Appellant and for the Respondent on the 13th December 2019.

AND UPON:

(a) The court having reserved judgement and circulated a draft judgment in advance and the matter being listed for a 'hand down' hearing.

(b) The attendance of counsel at the hand down hearing being excused.

(c) The parties having consented to the court making an order in relation to the payment of the hearing fee in preference to the matter being referred back to the lower court.

(d) The court noting that the Claimant has redacted a letter of the 7th September 2018 annexed to the application and it being asserted that the redaction masks a concession by the Claimant that the Defendant was right to assert that the matter should proceed by detailed assessment of costs. Thus the court being concerned to understand whether there was a potential for the court to be misled by the redaction, why the redaction was made and whether thought was given to the fact that the court could potentially be mislead.

(e) The court wishing to be assured that the hearing fee in this case has been paid and that there has been no breach of the indemnity principle.

IT IS ORDERED:

1. The Appeal against the order of District Judge Davies dated the 15th April 2019 is allowed and the Respondent do pay the disputed disbursements of the action to be summarily assessed at the hearing referred to in paragraph 4 of this order.

2. Not less that seven days prior to the hearing referred to in paragraph 4 of this order the Claimant shall file and serve a signed Form N260 which may be limited to the last substantive page.

3. Not less than twenty one days prior to the hearing referred to in paragraph 4 of this order the partner with conduct of this matter on behalf of the Claimant shall file and serve a witness statement addressing the following issues:

    a. Exhibiting an unredacted copy of the letter of the 7th September 2018 unless it is argued that the Claimant has a right to redact the letter.
    b. The reasons for redacting the letter.
    c. What thought was given as to the possibility that the court would be misled by redaction.
    d. Any other relevant matters.

4. The appeal be relisted before HHJ Lethem t/e 90 minutes to consider the above matters and any matters ancillary to the judgment and time shall not run until after the adjourned hearing.

5. Any skeleton argument relied upon at the adjourned hearing shall be filed and served not less than three days prior to the hearing and shall be copied by email to HHJ Lethem directly.

HHJ Lethem
* January 2020.