Costs Law Brief

The costs team at **Kings Chambers** in Manchester and Leeds on partial costs orders

In the days before the Civil Procedure Rules 1998 the approach of some claimants might be described as "kitchen sinking". Every conceivable allegation would be included. The person pleading the claim was usually content with such a course as it left all available options open and provided some comfort against a future allegation that a claim had been negligently omitted.

In tandem with that approach, the knowledge that the claimant was likely to recover full costs even on a partial success was a factor that heavily influenced negotiations.

Fortunately, those days are long gone. All parties are now well aware that it is likely that the costs order made at the conclusion of litigation will reflect the relative degrees of success of the parties.

The immediate and deliberate consequence of the greater encouragement of flexible costs orders brought about by the CPR is that claimants now must be far more selective about the allegations they pursue. Inclusion of makeweight allegations that fail might be mirrored by a later exclusion of some costs. This much was clearly confirmed by Lord Woolf in *AEI Ltd v Phonographic Performance Ltd* [1999] EWCA Civ 834:

"From 26 April 1999 the 'follow the event principle' will still play a significant role, but it will be a starting point from which a court can readily depart. This is also the position prior to the new [Civil Procedure] Rules coming into force. The most significant change of emphasis of the new rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new rules are reflecting a change of practice which has already started. It is now clear that a too robust application of the 'follow the event principle' encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so."

The extent of the flexibility that would be exercised in order to deal with cases justly was made very clear by the Court of Appeal in *Johnsey Estates (1990) Ltd v The Secretary of State for the Environment* [2001] EWCA Civ 535 when, at para 21, Chadwick LJ (with whom the rest of the court agreed) observed that current costs principles included that a judge may deprive a party of costs on an issue on which he has been successful if satisfied that the party has acted unreasonably in relation to that issue.

Even further, in a suitably exceptional case, it may be appropriate to make an order which not only deprives a successful party of his costs of a particular issue (on which he has lost) but also an order which requires him to pay the otherwise unsuccessful party's costs of that issue, without it being necessary for the court to decide that allegations have been made improperly or unreasonably. See the judgment of Longmore LJ (with whom the rest of the Court of Appeal agreed) in *Summit Property Ltd v Pitmans (a firm)* [2001] EWCA Civ 2020.

A further and very difficult consequence of the now commonplace flexibility on costs is that much more care needs to be taken in respect of the making of CPR part 36 offers. A stage in any proceedings might be reached where it can fairly be predicted that the claimant is likely to succeed in part only. In those circumstances both parties have the difficult task of attempting to gauge a well measured part 36 offer that is likely to include a partial offer on costs. That, of course, requires the parties attempting to second-guess the ultimate value judgment of the court on costs.

While attention to previous decisions on partial costs orders might give advisers some feel for the way a court is likely to exercise its judgment on costs, this is one of those value judgment areas **that are be cannot be [sense?]** governed by authority. The best one can do is continually to monitor the prevailing wind.

CPR 44.3

The foundation for present-day costs orders is to be found in CPR 44.3. The court has discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid. If the court decides to make an order about costs the general rule is still that the unsuccessful party will be ordered to pay the costs of the successful party but the court may make a different order. By CPR 44.3(4):

"In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including:

(i) the conduct of all the parties;

(ii) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(iii) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36)".

That there is complete flexibility to make an order for costs that deals with the case at hand justly is apparent from CPR 44.3(6) which states:

"The orders which the court may make under this rule include an order that a party must pay:
(i) a proportion of another party's costs;
(ii) a stated amount in respect of another party's costs;
(iii) costs from orl **[?]** until a certain date only;
(iv) costs incurred before proceedings have begun;
(v) costs relating to particular steps taken in the proceedings;
(vi) costs relating only to a distinct part of the proceedings; and
(vii) interest on costs from or until a certain date, including a date before judgment."

The above list of orders is nothing more than a list of those that are "included" as permissible orders. The list is not exhaustive and different sorts of orders may be made. This happened in *Gil v Baygreen Properties Ltd and others* [2004] EWHC 2029 (CH) when a successful claimant was in effect fined £20,000 for fabricating evidence and failing to take a sensible opportunity to negotiate when the alternative was the accrual of costs disproportionate to the sum recovered. The claimant was awarded her costs to be the subject of detailed assessment if not agreed, less, after assessment, the sum of £20,000.

Where the success of a party varies on different issues, CPR 44.3(7) urges the court to make orders in respect of a proportion of a party's costs or to award the costs from or until a certain date, in preference to making awards that one party do pay to the other the costs of this or that issue. There can be no doubt that any trial judge who has experience of a detailed assessment will gladly follow this course.

Painting v University of Oxford

In *Painting v University of Oxford* [2005] EWCA Civ 161, an employee of the University was injured in a fall at work. Liability was admitted and the parties agreed a deduction of 20% for contributory negligence. The claimant maintained that she had suffered a back injury that rendered her permanently unfit for work. The University maintained that the claimant had fully recovered. The claimant sought damages of about £400,000 after the deduction for contributory negligence. The damages in fact awarded at the disposal hearing were £25,331.78. The University had obtained significant video surveillance evidence which indicated that the claimant had deliberately misled the medical experts who had examined her for the purposes of the litigation. Initially, the university had failed to appreciate the significance of that evidence and had made a payment into court of £184,442.91. That money stood in court for less than a month when the University was then granted permission to withdraw all but £10,000. No further offers were made by either side.

At the disposal hearing the Recorder concluded that the claimant had deliberately exaggerated her injuries and that she had recovered for the purposes of her claim for loss of earnings just over three and a half years after the accident. It was found that the claimant had misled the medical expert who had examined her for the purposes of the proceedings.

At first instance, the University was ordered to pay all of the claimant's costs on the simple basis that notwithstanding the claimant's exaggeration the defendant could and should have protected itself by a more substantial part 36 payment. The Court of Appeal set aside that order and made an order that it described as "not ungenerous" to the claimant. It allowed the claimant her costs up until the time that the University was granted permission to withdraw all but £10,000 from the sum paid into court. Thereafter, the claimant was ordered to pay the University's costs. The Court of Appeal plainly considered that the following three factors warranted the order it made:

- viewed objectively, the totality of the judgment was overwhelmingly favourable to the University. It was in real terms the winner (the two-day disposal hearing had been concerned overwhelmingly with the issue of exaggeration. Indeed that had been the main issue since the reduction of the money in court);
- there was a strong likelihood that, but for the exaggeration of the claimant, the claim would have been settled at an early stage and with modest costs;
- at no stage did the claimant manifest any willingness to negotiate or to put forward a counterproposal to the part 36 payment.

If a party has arguments about the conduct of the other that might be relied upon to persuade a court to make a partial costs order, the safest course is to make that argument to the trial judge or other tribunal deciding the substantive issue, rather than leaving such an argument to detailed assessment proceedings. Clearly if there is a contested hearing of the substantive issue, the adjudicating tribunal, rather than the costs judge, is in a better position to make decisions on the extent to which conduct should affect the costs awarded. A costs judge might (and should) decline to permit arguments on conduct that should have been raised at the conclusion of the substantive proceedings. This course has powerful judicial recommendation. See paras 20 and 21 of the judgment in *Aaron v Shelton* [2004] EWHC

1162 (QB) (approved by the court of Appeal in *Gray v Going Places Leisure Travel Ltd* [2005] EWCA Civ 189). Similarly, a party who compromises should not agree to pay the costs of the other on the assumption that it will be permitted to challenge the amount of costs at assessment on the grounds of conduct. Steps must be taken to include in any compromise (or part 36 offer) a term protecting the paying party's position, such as a term that makes clear that conduct will be relied upon in the detailed assessment in order to seek to reduce the costs payable. It follows that a defendant who wishes to offer a sum of money in compromise together with a partial payment of costs would be safer making a part 36 offer stating clearly the extent of the costs offered, rather than simply making a part 36 payment with the intention of raising arguments on conduct at detailed assessment.

Burchell v Bullard & others

A recent informative application of the current principles occurred in *Burchell v Bullard & others* [2005] EWCA Civ 358. A small builder agreed to build an extension to the home of Mr and Mrs Bullard. Payment was to be way of four stage payments. The Bullards refused to make the third payment on the grounds of complaints they had about the work, especially the roof to the extension. The roof had been put on by a subcontractor. Burchell instructed solicitors who suggested mediation. The defendant's surveyor replied that the matters complained of were technically complex and not suitable for mediation (the Court of Appeal described this response as "plain nonsense"). Burchell therefore brought proceedings claiming £18,318.45. The defendants counterclaimed £100,815.34 plus further unparticularised damages. £23,646.88 of the counterclaim related to the roof which, the defendants alleged, needed rebuilding. Burchell brought a CPR part 20 claim against the roofer.

The trial took five days. Judgment was given for the claimant in the sum of £18,327.04. The defendants were awarded £14,373.15 on the counterclaim. Allowing for VAT and interest, the judge ordered the defendants to pay the claimant the difference of £5,025.63. Only £79.50 was awarded on the part 20 claim and the claimant was ordered to pay the roofer his costs. Otherwise, the order made by the judge was costs to the claimant on the claim and to the defendants on the counterclaim. The combined costs incurred by the parties were estimated at £185,000—a situation the Court of Appeal described as horrific.

The Court of Appeal drew back from imposing a costs sanction, pursuant to *Halsey v The Milton Keynes General NHS Trust* [2004] EWCA Civ 576 essentially because the law on the requirement to attempt alternative methods of dispute resolution was not as clear in the earlier periods of the dispute as it is now. In para 43, Ward LJ (with whom Rix LJ agreed) said:

"The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate… defendants in a like a position in the future can expect little sympathy if they blithely battle on regardless of the alternatives".

The Court of Appeal decided that justice was to be achieved by ordering the defendants to pay the claimant 60% of the costs of the claim and counterclaim lumped together plus 60% of the costs that the claimant had to pay to the roofer.

The following factors were relevant:

- costs following the event is the general rule and in commercial litigation such as this the event is determined by establishing who writes the cheque at the end of the case;
- the claimant had not exaggerated his claim but the defendants exaggerated theirs;
- the defendants pursued their claims unsatisfactorily in terms of their expert evidence. One expert used by them had not conducted a proper inspection. Another expert was abandoned by them and they proceeded to trial on the counterclaim relying largely on admissions made by the claimant in his reply;
- both the claimant and defendants were at fault in their conduct of the proceedings but the defendants were more unreasonable;
- the defendants lost much more than they won;
- on the particular facts of the case, and notwithstanding the limited recovery made against him, joining the roofer was a reasonable and proper course to take.

Whereas the court has the overriding objective to deal with cases justly, that of the parties (at least so far as costs are concerned) is to pursue cases economically by:

- arguing only their good points without exaggeration;
- attempting ADR and negotiating realistically;
- making full and imaginative use of part 36;
- adhering to case management decisions and timetables;
- narrowing issues for hearing.

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