The Costs Briefing

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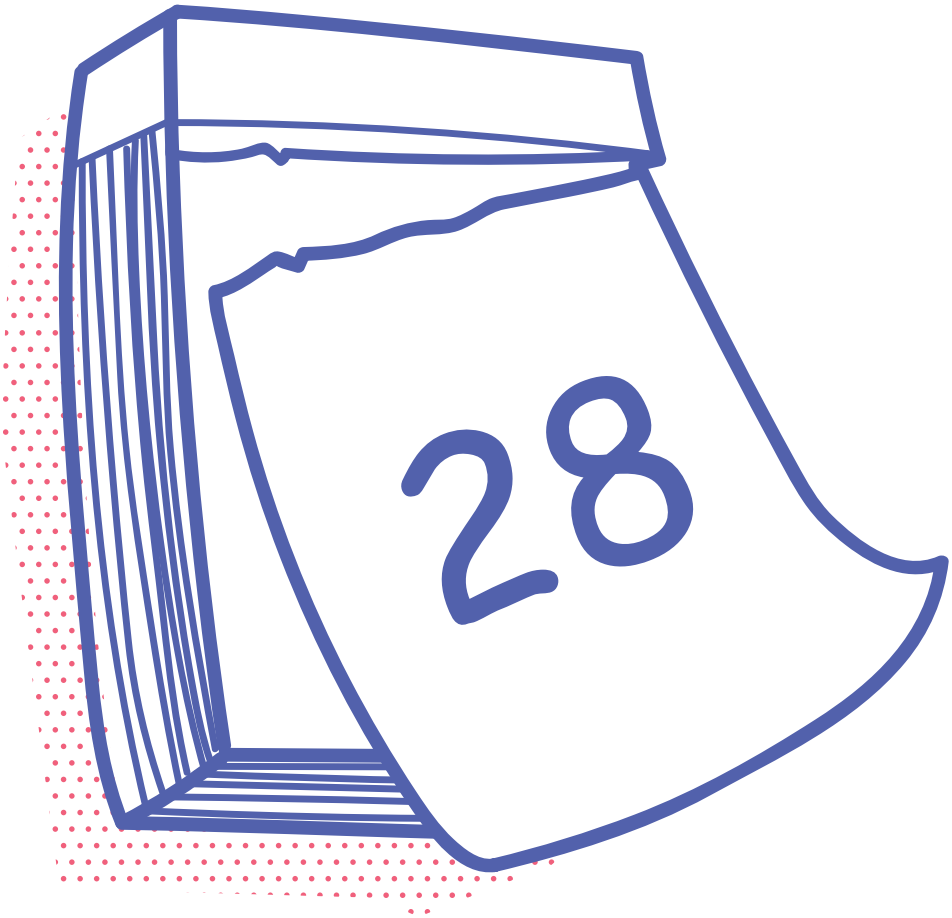

→ **Costs management in arbitration.** Will Sir Rupert Jackson's ideas gain traction? → **Look before you leap.** Kevin Wonnacott looks at how we approach detailed assessment in budgeted cases. → **The Rule of Law and I, Solicitor.** Simon Davis, Vice President of the Law Society, gives his view. → **Costs Roundtable report.** A summary of last month's Roundtable. → **Terminating retainers.** Ed Marrow's essential guide to getting paid. → **Brexit for litigators.** Jeremy Morgan QC guides us through the litigation maze. → **News from the team.** James Coleman's ten-year 'costs' anniversary.

Introduction

Writing the forward to each edition of the Costs Briefing is a labour of love for me. It gives me a chance to reflect on where we are as a business, the dispute resolution landscape in general and what's on the horizon. This edition is no exception.

I am absolutely delighted that Simon Davis, of Clifford Chance and Vice President of the Law Society, has contributed to this edition – with the title of 'The Rule of Law and I, Solicitor' it's a must-read for all of us.

Andy's article on costs management in arbitration reminds me that we never stand still – our skills and expertise continue to grow and are of value to our clients in an increasingly broad dispute resolution arena.

Kevin's article about budgeting reflects the still developing case law and practice in this area, more than five years into the new costs management regime. Ed's guide to getting paid when a retainer has been terminated is a timely reminder of the dire consequences (no payment of fees) of an improper termination.

Last month's Costs Roundtable was well received, as ever, and hearing from both Nick Bacon QC and Master Colum Leonard was an absolute privilege. The usual summary of the discussion can be found in this edition.

The timing of this issue of Costs Briefing makes it inevitable that there will be a 'B' article. Jeremy's contribution is insightful and provides some down to earth advice on the effects for litigators and their clients.

Lastly, we have had a few 'significant' birthdays in the team this year including James Coleman's ten-year 'costs' anniversary and his thoughts on his career to date are in our 'Meet the Team' section.

I hope to see many of you in the lead up to Christmas, but this is also my opportunity on behalf of everyone at Practico, to thank you all for your continued support in working with us. Here's to 2019!

Deborah Burke
Managing Associate

The case for costs management in arbitration

Andy Ellis

Way back in May this year, when the grass was still green and some people in London could be spotted wearing two layers of clothing, Sir Rupert Jackson popped over to Mauritius and delivered the keynote speech at the 11th International Conference on Construction Law and ADR.

Although barely two months into his new practise as an arbitrator, his observations about the advantages of arbitration over litigation were typically forthright. Perhaps jaundiced by the glacial passage of the reforms that bear his name, Sir Rupert declared that arbitration is "head and shoulders" above litigation when it comes to procedural reform because it is broadly responsive to the needs of users and not so affected or delayed by political issues.

The closing section of his speech brought him back to familiar territory and noted that 67% of respondents to a Queen Mary University review this year identified the high level of costs as the worst feature of international arbitration.

There is no doubt that Sir Rupert regards costs management as one of the more successful strands of his reforms. He forecast in 2013 that within a couple of years practitioners would be wondering what all the fuss was about, and many will now admit that, give or take a year, he was proved correct.

My experience bears out the notion that active costs management has become absorbed into normal litigation life. The mechanics of the process are more familiar, the *Harrison* judgment has made sure litigators take the whole thing more seriously, and the advantages of increased predictability have become more evident.

Added to that, pragmatic guidance such as Master Marsh's in *Sharp v Blank* has taken the convolution away from presenting budget variations. I find that most people these days agree that costs management is here to stay and likely to be extended into higher-value cases, especially group litigation.

So, what's to be gained by encouraging the introduction of pre-emptive budgeting to arbitral proceedings? The answer should be obvious.

At our quarterly costs roundtable meetings, senior litigators regularly discuss the pros and cons of arbitration versus litigation under the relaxed environment of the Chatham House rule. One City partner described going into an arbitrator's costs award determination as being about as comfortable as cooking burgers at a barbecue while naked.

Certainly, the wide discretion available in

not only the amount of costs but what falls under the ambit of costs, can produce extreme results. In *Essar Oil v Norscot* in 2016, the receiving party was even able to recover the third-party funder's bounty as a recoverable cost in the arbitration – a decision held up on appeal.

Having some notice at an early stage as to what the arbitrator may award in costs is liable to help manage clients' expectations and focus more sharply the parties' submissions about the incidence and amount of costs in the short window usually provided by the arbitrator when the award is circulated.

However, despite the attractions, I would not expect Sir Rupert's idea to find favour immediately. One wonders why it is that active costs control has not been exercised widely within arbitration, even though costs-capping powers were conferred by section 65 of the Arbitration Act back in 1996.

Senior lawyers have also reported a reluctance by arbitrators to entertain security for costs applications, even though the powers have been written into LCIA Arbitration Rules since 1998.

Perhaps the explanation is simply that one of the attractions of arbitration remains its procedural light touch relative to litigation and that the examination of any level of detail on costs will side-track the process. And if indeed this is the prevailing attitude, I can't see Sir Rupert's initiative gaining traction in the short term.

This article originally appeared in Litigation Futures in August 2018

https://www.litigationfutures.com/blog/the-case-for-costs-management-in-arbitration

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Look before you leap – Costs Assessments when there are agreed or approved budgets

Kevin Wonnacott
Operations Director

The Court of Appeal in *Harrison* upheld the premise that, provided a party ultimately incurred the costs which had been either approved or agreed and fell within the ambit of costs that could be subject to a costs management order ("the budgeted costs"), any recoverable budgeted costs from an opponent on the standard basis, absent a reason to depart, would be allowed at those agreed or approved amounts on any resultant detailed assessment.

There is no requirement to rely on reasons to depart from budget where the costs are payable on the indemnity basis (yet, confusingly, the courts will still have regard to the last approved or agreed budget when assessing the costs on any basis).

The issue of what constitutes reasons to depart (either up or down) from the budgeted costs is still a matter of debate and one which the appellate courts have refused to be drawn into. The issue needs to be looked at case by case. A common reference point employed in applications to depart is the description of the assumptions upon which the budgeted costs were

agreed or approved, and how those assumptions compare to how things panned out.

We recommend that there should be engagement between the parties at the end of a case and before a bill of costs is prepared to explore the extent to which some or all of the budgeted costs can be agreed or whether there is to be an issue on departure from budget.

We usually encourage parties to seek to narrow the areas of dispute phase by phase on the budgeted costs before a bill is prepared. Without that dialogue the receiving party will incur (and seek to pass on) the full cost of preparing the bills in respect of budgeted costs for each phase, including for the costs in those phases which fall within the agreed or approved amounts and are not so easily challenged.

If the parties are unable to agree the criteria and eligibility for departure, it is possible to go to have the court decide the principle in the context of that case as a preliminary issue. Such a step could help to contain the costs of preparing bills and also the wider costs of the assessment.

Some paying parties will be reluctant to proceed on a piecemeal basis as they will lose the ability to scrutinise the detail of the costs incurred in phases that fall within budget and potentially miss the chance to raise 'boundary' disputes concerning misattribution of costs from overspent into underspent phases.

There remains however an opportunity to rehabilitate detailed assessment as an efficient way to resolve quantum disputes. There is an attraction in focusing the parties' minds on the areas of most obvious overspend, the grounds for departure and the amount by which it would be reasonable to depart.

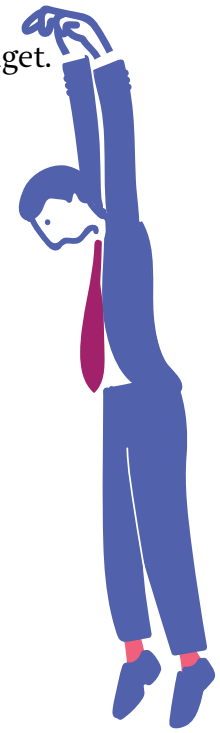
If that seems too broad-brush it is discernibly more forensic than the arbitrary sting in the tail lying in wait in the form of the stand-back proportionality test. This reshaping of the old *Lownds* test wherein necessity and reasonableness became a distinction without a difference into one that militates against predictability will hopefully be the first abandoned limb of the LASPO reforms.

In the meantime, given the introduction of the new format electronic bill and the number of bills now being prepared and served in the new format, there will be a need for the rules to be amended to accommodate the consequent steps in the assessment process and I think that might tie in well with any amendments required to deal with the applications within detailed assessment that deal with the potential to

depart

from

budget.



The Rule of Law and I, Solicitor

Simon Davis

The fabric of society is built around legal rights and obligations. Getting a job, buying a home, driving a car, getting married, getting divorced, running a business, employing, being employed, and often most life changing of all: being sued or threatened with prison – all depend on legal rights and obligations being validly created and effectively enforced. In short, civilised society depends on the Rule of Law being enforced, not the law of the jungle or the rule of the mob. And at the heart of upholding the Rule of Law is the solicitor.

Every year many hundreds of newly qualified solicitors attend admission ceremonies at Chancery Lane, conducted by the officeholders.

And a moving occasion it is. A fabulously diverse mix of age, race, colour, sex, religion, sexuality, background and physical ability come to the Law Society with their friends, families and partners, all bursting with pride.

And when it is my turn, I remind solicitors that their job is to help people stay out of trouble and that it is a great privilege to be the one who others entrust with resolving some of the most stressful moments they will ever experience.

And I remind them that with that great privilege comes a great responsibility. A client trusts that the solicitor is someone who is honest, who has integrity and who will give them impartial, clear and expert advice. Often the kind of advice they will not want to hear, and it is not the job of the solicitor to give clients the advice they want to hear, but the advice that they need. The solicitor is obliged to act in the best interests of the client, not their own. As officers of the court the solicitor is also obliged to put their responsibilities to the court ahead of their responsibilities to the client. One of the worst sins a solicitor can commit is to mislead the court or the opposition with a view to their client's case prevailing.

When I talk to these solicitors and their families afterwards, it is obvious that they needed no reminding of these responsibilities. And even if they did, our regulator the SRA is there to remind them. Our Parliament and regulators recognise that there is something so fundamentally important about the enforcement of the Rule of Law that our citizens require an added level of regulatory protection beyond that available to consumers generally. This is particularly applicable and important where civil and criminal court procedures are involved and personal liberty at stake. And it is the existence of the professional relationship of mutual trust and confidence between a solicitor and a client which further distinguishes that relationship from the arm's length transactional arrangement between a seller and buyer in the marketplace.

I listen to the solicitors' life stories. Some have University degrees, others qualify through the Chartered Legal Executives route, many worked part-time while studying at law school and all are looking forward to their careers ahead with a mixture of excitement and nervousness.

Overall, I am left feeling inspired and that the Rule of Law is in safe hands. Save for one dark and worrying shadow. Where are the criminal

lawyers? Young solicitor after young solicitor tells me about their new roles in family, property, personal injury, wills, planning, litigation, mental health, commercial and corporate but where is crime? All too few. And is it any wonder.

The Law Society, the Criminal Law Solicitors Association and Bar Council, to name just a few, have shouted alarm from the rooftops, in the press, in Parliament, in court and on the streets at the devastation which has been done by governments of every hue to our criminal justice system. In the eyes of politicians it appears not to have the same appeal to voters as the NHS or the price of beer and petrol, but our system is in a crisis which is undermining fundamentally the Rule of Law and will deteriorate further as the deserts of criminal lawyers spread the land.

The recent publication *"The Secret Barrister"* should be compulsory reading for anyone in positions of influence. The solicitor is described as the *"guiding light from dawn until dusk"*, with their existence being described as critical to ensuring that our criminal justice system functions as it should. But the devastating cuts to Legal Aid mean that young solicitors on whom the future of the Rule of Law depends cannot make a living during those dawn to dusk hours.

The average age of a criminal duty solicitor across the whole of England and Wales is approaching 50. Taking just Worcestershire as an example, 63% are over 50. And even when solicitors do choose to specialise in criminal law they find themselves in a system which is not just woefully under resourced but one often regarded by the media as getting in the way of the "right result" that the public desires. No wonder so many move into less stressful and better paid areas of the law.

All is not lost. Despite the challenges, there are still many young solicitors and barristers keeping the Rule of Law afloat and propping up our system of justice. We are lucky to have them.

But unless you are content that one day the newly qualified solicitor heading into the criminal justice system is an object of curiosity, that our courtrooms are thronged with litigants in person and that you or your loved ones are sitting in a cell with no-one to call, waiting for the judgment of politicians or the press to be handed down, get round to your MP and call for action.

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Simon Davis is the Vice President of the Law Society for England and Wales 2018 and a Partner at Clifford Chance

Costs Roundtable

Devonshire Club, 4 October 2018

Deborah Burke
Managing Associate

Third Party Funding

Nick began by exploring funding options and how litigators feel about them – conditional fee agreements, discounted fee arrangements, DBAs and a market awash with litigation funders offering different schemes.

"...an increasing number of instructions where lawyers are seeking an arrangement under which they share in the profits that the funder is making."

Nick has an increasing number of instructions where lawyers are seeking an arrangement under which they share in the profits that the funder is making.

There are city firms that have associated businesses in the US with well-established funding arrangements in place. The US firm provides funding and the group as a whole makes a profit not only from the profit costs that the UK firm generates, but also from the return on funding that the US arm provides.

In a more direct arrangement, the funder funds the solicitor's complete book of cases (portfolio funding), there are agreed parameters and, in return, the funder funds WIP, usually under a discounted CFA. The funder might fund 60% of the WIP and the rest is deferred and, in return for that, the funder takes its return. If there is anything left over the balance is split between the funder and the solicitor.

A firm can fund disbursements and the risks of adverse costs. In the *Southwark* case there was no upside for the solicitor in return for funding the adverse costs and the arrangement wasn't champertous. Funding the adverse costs risk in return for a percentage of the damages might be viewed differently.

"The driving force is the cost of litigation funding. It's just too expensive..."

The driving force is the cost of litigation funding. It's just too expensive and solicitors' firms can offer their own funding which is less expensive.

The SRA is more concerned with client information. Clients need to be told precisely what the solicitor's interest in the funding is.

Nick's view is that within the next decade solicitors will be funding cases mainstream.

Discussion

Law firms have floated and set up litigation funds. Some brokers are offering firms the opportunity to 'monetise' their WIP in return for a (significant) return on the sum advanced.

If you are running high value PI or clinical negligence claims, you are already funding the litigation.

There are also scaled DBAs – pre-issue, post issue, trial, escalated arrangements.

Solicitors are still cautious about the possibility of a successful challenge to a DBA although we may see improved regulations at some point.

Nick's very clear view was that the costs of an interim application can be recovered under a DBA.

The experience of insuring up to 50% of your costs under a DBA/CFA through 'The Judge' and the possibility of taking out insurance against the DBA failing were discussed – as was insur-

ing WIP with an ATE policy.

In the case of *Glasgow* (a professional negligence claim arising out of a construction case), the validity of the DBA was challenged. Making that argument to the court with everyone knowing the effect of what was being sought

> *"...electronic spreadsheet bills had worked as they should."*

was a significant challenge. The Senior Courts want these arrangements to work.

Electronic bills of costs and budgets

Nick is a fan of the old-fashioned paper-based bill and hasn't yet been involved in a detailed assessment in court with the new bill format.

Master Leonard confirmed that in his experience electronic spreadsheet bills had worked as they should. Master Leonard has carried out 9 or 10 assessments in electronic format.

In provisional assessments, findings are made on the bill, the figures change, the bill recalculates, and the Master can send back to the parties a document that shows what has been done and the result – in a single document which can be emailed.

The SCCO hasn't run into any serious problems. The published Precedent S has already been revised once and substantially improved and it is expected that this process of revision and evolution will continue.

There are two other aspects which are crucial:

- How to record time
- How easy is it to create a bill of costs?

Preparation of a bill for detailed assessment is unlikely to become a completely automatic process. Fee earners don't always record their time correctly and someone must look at it critically and make sure that the costs claim is presented properly.

During the consultation process, a very good point was made about the cost of reverse engineering into the new phase/task/activity structure, time entries created before the new bill format became compulsory. Lord Justice Jackson's solution, adopted in the CPR from Novem-

> *"...bills would have to be prepared in the new format only for work done from 6 April 2018..."*

ber 2017, was to provide that bills would have to be prepared in the new format only for work done from 6 April 2018, so putting legal representatives on notice of the new requirements.

At present, the rest of the detailed assessment process is still paper based. There is no current system for filing, for example, points of dispute electronically although a paperless SCCO court file system is expected to be introduced within the next year.

Discussion

Most costs claims don't go to detailed assessment and Practico's view is that the new Prec-

> *"...the new Precedent S provides a much more transparent basis for conducting a costs negotiation."*

edent S provides a much more transparent basis for conducting a costs negotiation. An electronic bill makes it easier to focus on an area of the bill which looks vulnerable and focus on that. Figures can be discussed at a higher level to get the costs resolved.

The new format is designed to encourage the reader to look at the high-level position first and then to look at increasing layers of detail if needed. Precedent S is not prescriptive beyond the basic summaries.

One of the main difficulties with the old format was that the paying party was forced to spend significant time working out and presenting back to the receiving party what they had spent their money on. Reverse engineering bills of costs is expensive and is one of the reasons why litigators were reluctant to engage in the

detailed assessment process.

The new bill format should make the detailed assessment procedure more efficient and less expensive. If time recording has been done optimally, there will be fewer headaches at the bill preparation stage.

Most practice management systems can cater for time recording by phase, task and activity, but the quality of the time recording is only ever as good as the person recording it. Recording time spent which belongs to more than one

"If time recording has been done optimally, there will be fewer headaches at the bill preparation stage."

phase/task is a continuing challenge.

Is costs budgeting having the effect of reducing the number and length of detailed assessment hearings? It is still early days, but now that there is a level of certainty about budgets, there is a perception that budgeting is having this effect.

A practical perspective on detailed assessment

Nick highlighted the 'completely unacceptable state of affairs' in terms of advising clients about

"...'completely unacceptable state of affairs' in terms of advising clients about proportionality."

proportionality. After a line by line assessment of reasonable costs, the Costs Judge makes a 'stand back' decision on proportionality which then produces a proportionate figure for costs. There can be huge reductions. Nick's view is that this is unprincipled, but the Court of Appeal keep refusing permission to appeal any of the decisions from the lower courts.

The case of *Reynolds* [1] was decided in September. It was a budgeted case where the budget was set at £120,000. The damages were claimed at £175,000. There was no finding of dishonesty but at the door of the court it settled for £50,000. On a line by line assessment the Regional Costs Judge reduced the budgeted part of the bill to £116,000. Applying the stand back test of proportionality, those costs were reduced again to £75,000. This was the same as succeeding on every single point of dispute that had been raised by the Defendants, something that would be very rare on a traditional standard basis assessment.

The difficulty is that although the court may not get so involved with budgeted costs, when these are added to the pre-budget and other non-budgeted costs the total may be disproportionate.

A simple solution would be to abandon the word 'proportionate' and just say that costs must be 'necessary'.

Nick's view is that detailed assessment in a budgeted case is less forensic, and costs have increased as a result. This is completely counter to the intended purpose of the new regime which was intended to reduce not only recoverable costs but overall legal spend as well.

"...detailed assessment in a budgeted case is less forensic, ..."

Discussion

Practico has recently been dealing with a group of cases where the base costs have been agreed subject to proportionality. The fact that no-one can put a number on the proportionality argument is preventing the costs being resolved. At best, there might be a two-day hearing to deal with 30 cases rather than having all of the cases fully listed for separate detailed assessments.

The timing of the proportionality test being applied was discussed. To avoid the double jeopardy issue, reasonableness must be considered first and then proportionality reviewed once the reasonable figure has been established.

Questions raised included: Is the new proportionality test affecting Claimant and Defendant fee earner behaviour? Is duplication built into the process now, e.g. with statements going through multiple revisions and Counsel being involved at every stage?

What's on the radar?

There is an ATE case coming up in the Court of Appeal. A directions hearing has been listed to consider whether there should be a mini-trial with the intention of making findings of fact about the ATE market. Insurers will be invited to participate and there is a proportionality argument as well.

There is an appeal next month in the case of *Slade v Boodia* on whether or not a solicitor's bill must include all disbursements and counsel's fees for the period the invoice covers.

> *"...appeal ... on whether or not a solicitor's bill must include all disbursements and counsel's fees for the period the invoice covers."*

The case of *Herbert-v-HH Law Limited* is going to the Court of Appeal next year. It concerns the practice, in some parts of the personal injury market, of solicitors charging or having the right to charge a 100% success fee in every CFA case. The Law Society is intervening. More firms are targeting work done by a solicitor under some form of contingent arrangement and challenging the deduction from damages. The SCCO has been robust in warding off challenges where

> *"... SCCO has been robust in warding off challenges where applications are made for disclosure of the solicitor's files"*

applications are made for disclosure of the solicitor's files to assist in making a challenge under the Solicitor's Act e.g. *Riaz v Ashwood Solicitors LLP [2018] EWHC B5(Costs)*. Mr Justice Soole in the case of *Hanley v JC&A Solicitors and Green v SGI Legal* [2] has upheld that approach, which differentiates between documents belonging to the solicitor and to the client.

Discussion

It is likely that, where firms are providing funding, entirely separate arms of the business will need to deal with the funding aspect to avoid professional conduct issues arising. The decisions made on the case need to be the client's and not the funder's.

How will firms market their funding capability and ensure that clients understand the implications of different funding options? Clients will need to be fully aware of all relevant information and firms may well need to obtain alternative quotes from external funders for comparison purposes.

Nick isn't aware of any examples yet of solicitors providing funding and being the subject of a security for costs application.

Arbitration was also mentioned and Practico shared its experience of assisting with high level analysis of billing in arbitration matters so that decisions can be made by the arbitrator at the end of the case, both as to the incidence and the quantum of costs. Nick highlighted the fact that the costs of funding are potentially recoverable and referred to the *Essar* case and the fact that there are other jurisdictions around the world where funding costs are recoverable.

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[1] *Miss Sarah Jane Reynolds v One Stop Stores Limited, County Court at Norwich and Cambridge (21 September 2018)*

[2] *Hanley v J C & A Solicitors and Green and Others v SGI Legal LLP [2018] 4 Costs LR 693*

Terminating Retainers

Solicitors are not entitled to payment where they ceased acting without reasonable notice – *Mr Manjit Gill v Heer Manak Solicitors [2018] EWHC 2881 (QB)*

Ed Marrow
Senior Associate

The case of *Mr Manjit Gill v Heer Manak Solicitors* was heard in the High Court before Mr Justice Walker, sitting with a costs judge, Master Haworth, as an assessor

Background

Mr Gill had instructed Heer Manak Solicitors ('the solicitors') regarding litigation with HM Revenue and Customs in respect of a freezing order obtained against his assets. Agreed terms between Mr Gill and the solicitors were set out in a client care letter (retainer) dated 7 June 2013.

A case management hearing took place on 20 December 2013 where directions were ordered, with the trial date set for the end of April 2014. It was claimed that on this day there was no suggestion that the solicitors were in any difficulty.

On 27 December 2013 Mr Gill received a letter from the solicitors informing him that they were closing down due to their failure to secure indemnity insurance. Mr Gill claimed that as a result he had been 'left in the lurch'.

The solicitors had requested and received payments on account from Mr Gill for charges and expenses incurred as his case progressed. However, more than three years after the closure of the firm, it made a claim for amounts over and above those which he had paid on account.

Retainer

The court summarised the facts and issues as follows:

- A solicitor's retainer to conduct litigation is an example of what, although known as an 'entire contract', is better described as involving an 'entire obligation' – *Vlamaki v Sookias and Sookias [2015] EWHC 3334 (QB)*. The 'entire obligation' is, in effect, a condition precedent which must be satisfied before remuneration can be claimed; a solicitor can generally only claim remuneration when all work has been completed, or when there is a natural break.

- In the present case the retainer included provisions enabling the firm to make charges

even though the entire obligation had not been carried out. Clauses [29] and [30] of the retainer provided: '[29] We may decide to stop acting for you only with good reason, for example, if you do not pay an interim bill or comply with our request for a payment on account. We must give you reasonable notice that we will stop acting for you; [30] If you or we decide that we will no longer act for you, you will pay our charges on an hourly basis and expenses'.

First instance decision

At a hearing in January 2017 Master Simons was asked to rule on whether the solicitors had good reason for terminating its retainer and, if so, whether it had given reasonable notice. The Master ruled in favour of the solicitors on both points.

Appeal

Mr Gill appealed to establish whether the Master was right to conclude that reasonable notice of the termination had been given. This was the only issue to be determined.

The only evidence provided to the court was from Mr Gill and no factual evidence was provided by the solicitors regarding the circumstances leading up to their closure. In the circumstances Mr Justice Walker considered that where no factual evidence was filed by the solicitors, he could not accept that the Master was entitled to make the assumptions set out in his judgment.

It had been recorded in the Law Society Gazette that most firms in the same predicament as the solicitors had dealt with it in an orderly manner and, in the absence of relevant factual evidence, there was no reason to think that the solicitors were not equally able to deal with the termination of the retainer in an orderly manner. Mr Justice Walker considered that the course they took, giving Mr Gill no notice at all, could hardly be described as 'orderly'.

Further, he noted that from Mr Gill's perspective:

- there was no indication that the transfer of the file was to a firm which could be expected to have the necessary expertise to advise Mr Gill (or that they had the authority to transfer the file in the way they apparently did);
- he was left without cover during a period when there might have been significant developments in the litigation, after a tight timetable had been imposed at the CMC; and
- termination of the retainer without notice occurred during the holiday season.

Conclusion

Mr Justice Walker concluded that the Master had been wrong to hold that the retainer could be terminated with no notice. It therefore followed that the solicitors were not entitled to terminate the retainer and could not claim their fees.

Accordingly, when terminating a retainer, a solicitor should always carefully consider:

- The terms of the retainer with the client;
- Whether the decision to terminate is a reasonable one;
- Whether they have taken the client's perspective into account;
- Whether the decision is supported by factual evidence.

Brexit – the end of the road for costs lawyers?

Jeremy Morgan QC
Vice-chair British in Europe

No. Just teasing. Costs lawyers will be among the last to be affected, in their professional lives at least, by Brexit. However, the wider legal profession will be affected and, since when the profession as a whole sneezes costs lawyers eventually catch a cold, it makes sense to have a quick overview of the current panorama. This is helped by the fact that the Law Society has recently published its advice to the profession on preparing for a No Deal Brexit – see *https://www.lawsociety.org.uk/support-services/advice/articles/no-deal-brexit-providing-legal-services-in-eu/*.

The EU's single market in services has worked very well for lawyers, particularly those from the UK. This country accounts for 20.3% of the EU market in legal services and many foreign, particularly US law firms, established a presence in the UK partly in order to gain access to the EU market. There are 42 EU27 firms with a presence in England and Wales, mainly London. By contrast UK firms are represented in 26 of the 31 EU27 and EFTA jurisdictions, and in 2015 around 1% of practising certificates were issued to solicitors based in EU27 countries. The ability of both individuals and firms to practise across the Channel from their country of origin is facilitated by four EU Directives, two specific to lawyers, and two of more general application to the provision of services and the recognition of professional qualifications.

But what will happen come 11pm (UK time) on March 29th 2019? The UK and the EU27 have of course now agreed the terms of a Withdrawal Agreement pursuant to Art. 50 of the Treaty on the European Union. But the biggest obstacle to the agreement is whether it gets past the Westminster Parliament's "meaningful vote". It is still anyone's guess what the "meaningful vote" means if it does not and what happens next. Although the European Parliament also has to approve the deal, it is less unpredictable on the subject than its counterpart in London.

If there is a Deal, then it is fairly clear what rights individual lawyers practising cross-Channel already or up to the end of the transition period on December 31st 2020 will have. Under the EU Directives UK lawyers practising in the EU27 [1] have two means of doing so and, under the Withdrawal Agreement, these rights will continue until the end of the transition period.

UK lawyers can practise under their home title – ie English solicitors practising as English solicitors without requalifying. If they choose that route they have to register with the local legal profession but, subject to that, they can practise in English law, the law of their host state, international and EU law. Certain activities such as conveyancing and probate may be

reserved by the host state so as to exclude them, and if involved in litigation they may have to work with a lawyer of the host state. Probably the majority of English lawyers practising in the EU27 have followed this route, though many of them operate in highly specialist fields of EU law such as competition or patent law.

The Withdrawal Agreement removes the right to practise under home title even from those who already practise that way, making it necessary for them to give up, requalify or for some purposes get admitted to the Law Society of Ireland. The reasons for this harsh decision, which came entirely from the European side, are not clear. The author's suspicion is that EU27 professions wanted to curtail the activities of UK lawyers who have been more successful in penetrating the EU27 market than vice versa. So practising under home title will cease, Deal or No Deal. This also means that dual qualified lawyers, eg a person practising both as a solicitor and an avvocato in Milan, will lose the automatic right to continue to practise as a solicitor.

The alternative route is for solicitors (or barristers) to use their English qualification and experience as a short cut to qualifying in the profession of their host state. This involves further exams and/or practical experience but does have the advantage of the lawyer in question being admitted to the profession of the host state and being able to practise as such. Qualifications obtained through this route and recognised prior to the end of the Withdrawal transition period will still be recognised. Even in the case of No Deal, qualifications recognised prior to March 30th 2019 will be recognised, it seems because both the EU and the UK accept that the recognition of a qualification is an acquired right which even they cannot bargain away.

However, Deal or No Deal, the EU system of mutual recognition of qualifications ceases on March 30th 2019 or January 1st 2021 (the date depending on whether there is a transition period), and UK lawyers who have not already requalified will lose their right of audience in EU courts. UK lawyers and their clients will lose the right of legal professional privilege in cases before the EU courts and institutions and, depending on national law, possibly also in EU27 countries. UK lawyers will also lose their existing FIFO (Fly In Fly Out) right to advise clients in the EU27 and may face immigration restrictions.

For the future UK lawyers wishing to practise in the EU and EU lawyers wishing to move to the UK will be subject to the law of the country they wish to practise in. The Law Society has

prepared a list of the rules that operate in each jurisdiction of the EU27, and will supply it on request – write to *http://international@lawsociety.org.uk*. These rules will apply unless and until something more liberal is agreed either UK/EU as part of the future relationship or as a result of bilateral agreements between the Law Society/Bar and the professions in the EU27 States. The Political Declaration setting out the framework for the future relationship has a highly aspirational section on exploring mutual recognition of qualifications and liberalisation of the market in services, but there is a lot of work to be done before any of this becomes a reality. In the meantime firms with substantial skin in the EU game are busy restructuring to meet the new environment.

Looking at the other side of the coin, the position of EU27 lawyers working or wanting to work in England and Wales is a mirror image. Registered European Lawyer status will cease at 11pm on March 29th (just to catch those workaholics who were planning to keep going until midnight) or on December 31st 2020 presumably also at 11pm UK time.

How will this all pan out? As a committed Remainer and activist for the preservation of citizens' rights, the author is tired of being told, "Oh, it'll all be OK". It will not be, for anyone. However, given its ingenuity and powerful instinct of self-preservation, the legal profession will probably suffer less than most. It must be doing all right out of Brexit advice already and there is plenty more of that to come.

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[1] This article is at present confined to the EU27 since only the Union is a party to the Withdrawal Agreement. Negotiations are proceeding with the remaining EEA countries and, it is believed, Switzerland.

News from the team

James Coleman
Senior Associate

> *"In year 1 of my costs career, the tools of the trade were pens, paper and a Dictaphone – now it's all about Excel. What changes will the next 10 years bring?"*

Unnoticed by all (admittedly including myself) my 10-year 'costs' anniversary recently passed by. Although belated, this seems like an opportune time briefly to reflect on those 10 years.

My costs career originally began in Ireland, where I practised for 3 years in a firm which, similar to Practico, focused primarily on commercial litigation. As a common law jurisdiction, there were many similarities with English Costs law, advocacy and bill drafting, which allowed me to put that knowledge and experience to use in England.

Once I began to practice in England my eyes were opened to a more complex and technical jurisdiction. Although I was struck by the attritional nature of the industry, with firms seemingly in a race to the bottom. After several years with a national costs firm an opportunity arose to work as a consultant for the Treasury Solicitor's Department (as it was formerly known). This was an invaluable experience, as I was not only exposed to complex and high value costs litigation in the post 'Jackson' era, but I was also afforded the opportunity to advise Senior Civil Servants and Ministers on departmental costs policy.

During years 8 to 10 of my 'costs life' I have been fortunate enough to work for Practico. What attracted me to Practico 3 years ago was their forward-thinking ethos. They were the original pioneers of the new electronic bill format and since joining I have been struck by, and energised by, their continuous strives to implement progressive methods of working so that our clients benefit from the efficiencies created, rather than joining the race to the bottom.

In year 1 of my costs career, the tools of the trade were pens, paper and a Dictaphone – now it's all about Excel. What changes will the next 10 years bring?

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