

Virtual Roundtable with Alicia Tew

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Attending:

Alicia Tew (AT)
Jeremy Morgan KC (JM KC)
Andy Ellis (AE)

JM KC:

We're delighted to invite today our guest, Alicia Tew, a rising star of costs in Hailsham Chambers. Someone who has got lots of things to say about the topics we're going to look at this morning.

The topics today, there are going to be three in principle, we'll probably stray into other areas as well but the first is a brief consideration of the very interesting decision of Costs Judge Leonard in the case called *Reed v Woodward*. I won't go into further detail at this stage, I'll leave that to Alicia to do.

Secondly, a brief look at the case of *Deutsche Bank v Sebastian*, which is a long running case with lots of decisions, but in this particular context it's the problems on detailed assessment in a very, very large case when the records are not all that they might be or even that the records are in the ether, but they're not readily accessible for the purpose of the assessment.

The third is a look at the forthcoming civil procedure rule change coming into effect in April on qualified one-way costs shifting. Although those of you who don't do personal injury work might think - oh that's not for me - it is quite interesting. It is an instance of the Supreme Court having made a decision, but really saying it's not a matter for us, we're not very good at this sort of thing, it's a matter for the Rule Committee which decides policy. This is what the Rule Committee then does with what they're asked to do by the Supreme Court.

I'll hand over to Alicia and we'll start off with the case of *Reed v Woodward*.

AT:

Thank you, Jeremy. Thanks very much for inviting me along today. The case of [Reed v Woodward](#) is an interesting one because it has illustrated some issues of wider application. Firstly, I think it's quite a good example of why lawyers or barristers shouldn't represent themselves, ever, because this is a very experienced barrister but not in the field of costs trying to, for example, draft his own Points of Dispute which didn't go very well for him. The two issues that I think we can look at today are when it's worth challenging whether or not there was a retainer in place and the

threshold for that and, secondly, considering how the Court will view a defendant's bill or a receiving party's bill where they haven't split it between the receiving party and the other defendants that didn't receive an Order for Costs because in this case there was no real division provided in the bill and that was very much something that Costs Judge Leonard wasn't impressed with.

This all arose out of a barrister having some bad building work done on his house. He did instruct solicitors initially to represent him in the trial. He sued both the building company and the director of the building company personally and, during the lead up to the trial, the building company went into voluntary liquidation and so he was left with only a claim against the company director. That was always going to be a more difficult claim to bring. The costs position in the background was slightly complex because DAS Legal were acting because there was a legal expenses indemnity for the company initially and then over time the second defendant, the director, was able to get cover under the same policy. Initially he had his own solicitors and then they were both represented by DAS Legal. And so, DAS were on the record for both defendants for some time. They came off when the defendant's company went into voluntary liquidation and then the order was made at trial that the second defendant had won. He did not have personal responsibility for the work that had gone wrong and so then there was a question of what costs the barrister claimant would have to pay. In the costs dispute the barrister represented himself which was not ideal.

The comments Judge Leonard made would send most of us into a state of some fear. When he was talking about the Points of Dispute he said, '...they tend (meaning no disrespect to the Claimant) to prolixity and repetition...' which isn't something anyone really wants to be said about their drafting, but the issues that were being taken were pretty scattergun as well. There wasn't really any strategy behind the disputes that were being raised.

The first main dispute was that the claimant said DAS was only acting for the company and was never acting for the company director, the second defendant. He also was very suspicious that CFAs had only come to light at the end of the trial and considered these to be cooked up – effectively forgeries. Costs Judge Leonard didn't take that on its face value and looked at the case more carefully. He was quite prepared to find that there had been a CFA throughout and that it was quite unlikely that DAS would have agreed to act for the second defendant for free effectively unless he won. Although there was quite a lot of the judgment spent dealing with those issues, fundamentally they didn't have much hope of succeeding. I think that it would take quite a lot for a court to find that there was no retainer at all where you have a solicitor's firm on record for a particular defendant.

There was also the question of whether or not the CFA applied. Of course, the CFA could apply for the entirety of the case. Even if it was only entered into later down the line, it can have a retrospective effective date. Again, the judge found that the claimant had failed to displace the assumption that there was a retainer.

The more complex issue is to do with the division between the two defendants because what DAS had somewhat interestingly chosen to do was to effectively put in all of the costs they could. The second defendant was their client for a large period but there were a lot of costs that were only attributable to the company, the first defendant, that had gone under during the course of proceedings. What will be interesting will be the next stage of this, because the issue was raised in general terms by Costs Judge Leonard and the second defendant was very much told that they would need to show the division between the two defendants. It will be interesting to see how that's done because lots of the issues were parasitic. The trial was about the second defendant, but the initial claim had been directed to the company. The company was said to have done defective workmanship and to have brought contaminated waste onto the

claimant's property. The second defendant was said to be personally responsible for those two things rather than just acting in his role as a company director.

What's quite tricky is that the claimant had to win against the first defendant, had to prove that there had been defective workmanship, had to prove that there had been contaminated waste brought onto the property, if he was going to have any hope of winning against the second defendant.

The question is, how is the Court going to separate out what was only relating to the first defendant and what should be attributed to them? You have a claim that needed all of those elements to be proved in order for the second defendant to be found liable. The Court wasn't impressed with claiming, for example, all of Counsel's fees on this issue and said you have to divide it up, but how that exactly would be done will probably be quite interesting to see if the case progresses, if we see another judgment in the case.

JMKC:

I just wanted to add one other issue that's also quite interesting in connection with budgeting.

The defendants' costs were budgeted and, of course, the same solicitors were acting for the first and second defendant. The second defendant had won and the first defendant had lost although some time previously. The question was, how does the budget apply in a situation where it applies to all the costs incurred by those solicitors for both defendants but only one is entitled to costs. Effectively the Costs Judge decided that the budget would act as a cap, so the second defendant being entitled to costs would not get more than the budgeted amount, but it was free to go below the budget on areas where it perhaps wouldn't have done against a single defendant because there was the question of these costs having been budgeted for two clients effectively, only one of them was entitled to costs. I thought that was a quite interesting little footnote on the question of budgeting.

AT:

Definitely. It is interesting because you hope that you're going to have quite a lot of certainty with budgeting, but when you've got these sorts of issues coming up, it's not at all obvious necessarily what the recovery is going to be at the end of the case. I think it is interesting. I was quite amused by Costs Judge Leonard, very politely I think, trying to tease out what could be argued and what really needed to be let go by the claimant.

JMKC:

It's difficult because there are some other points that you think might have been claimed and weren't, so it's yet another illustration of why a lawyer acting for themselves is the worst possible combination.

AE:

I just wondered if the phone rang and it was a barrister litigant in person seeking to instruct a costs lawyer to represent them in a building dispute in which they were unsuccessful, just quite how much we'd relish taking that phone call. Not very much. It is an interesting situation, but just for the avoidance of doubt, this isn't Practico saying 'Please come, litigants in person, especially if you're barristers'.

AT:

The nightmare client, some might think.

JMKC:

There's no cab rank principle for costs lawyers.

AE:

I don't think there is.

JMKC:

Absolutely not.

AE:

It is just interesting for people at the coal face that we do see more published judgments of first instance decisions. Not that they're binding, it's just that they are interesting and it's good to be able to air these issues when they come up. Certainly, interesting to people in the trade.

JMKC:

I agree Andy. All of this goes back to the decision of the House of Lords in the case called [Medway Oil](#), the question of division which is one of the most complicated House of Lords decisions I've ever read. I still don't understand what they decided because each judge gave a different judgment. You can read that highfaluting principle, but to see how it's applied in practice is really, really useful – not only for costs lawyers but for solicitors as well, because you need to understand these things. It's money to the client.

We want to move on then to the case of [Deutsche Bank v Sebastian](#), which I think is probably terrifying to everybody.

AT:

[14:16] I know that it's a case that has interested quite a lot of people to see what happens when these enormous bills come through. It's quite a good example of a case where the paying party has taken a huge number of points, only some of which have got any merit.

You'll all remember this, I'm sure. The judgment ordered was for US\$ 245M. In terms of the costs, the defendant had already paid GBP 32M plus VAT on account before the detailed assessment started. Because the bill itself was going to be so large (they claimed just over GBP 58M in terms of their costs and that represented the 85% costs award in the trial), the claimant (the receiving party), wanted to try and split the detailed assessment into various stages and that was rejected by the Judge. They had asked to split, initially, into preliminary issues including fees and then to serve a

hybrid bill in three parts chronologically but the judge wasn't prepared to allow that.

The problem was that the paying party had no idea what they would be on the hook for. They weren't going to see the total from the start and that really scuppers the chance to make proper offers. That was rejected and once we've talked about the case, I think we can come on to what else could have been offered by Deutsche Bank. There must have been a better way of managing this.

The detailed assessment ran into 97 days, about 40 ex tempore judgments and it ran from 2020 into 2022. There were over 1,500 items on the bill. The documents schedules ran into 2,000 pages so this was an enormously complex bill. The Points of Dispute were extremely lengthy, the composite document was 483 pages for the replies alone. We are looking at an incredibly complex, detailed set of bills and Points of Dispute and every single issue was taken.

The parties weren't even prepared to settle once they got an indication from the Court. If the judge is saying, I'm allowing x amount, x percentage or x proportion, the parties weren't then prepared to go through the items and even agree that category. It all had to be done by the Court.

I think that one of the things that we can probably see from this is that there's this criticism about the documentation and the information available about what the time was being spent on. We've got fee earners working really long hours. They're not prioritising how they're recording their time. No doubt because they're under enormous pressure while they're running this case, but it means that you have an exercise in what the judge described as 'forensic archaeology'. You have the costs lawyers having to go back to the servers to try and piece together what was happening because the time recording [entries] are so general and for such long periods of time very little information is being provided about what the work requires.

[The costs judge] said the files were filed in a server, in no obvious order which precluded any pre-reading, and the lawyers simply weren't able to find a large proportion of the documents that existed at the time the work was done.

I have some sympathy for that because it was quite a long period of time from when the work was done to the time when the detailed assessment was being carried out, but the problem was that when you've got these very vague time entries that don't tell you what is being worked on and you've got files stored on a server that are basically impossible to piece together after the event, you are left with very little for the costs lawyers to work with fundamentally. It's got to come down to that judgment, that educated understanding of the case, but then it's quite hard to defend it.

At the end of all of this, 97 days of arguing about every single possible point that the receiving party could take, the costs had been awarded on the indemnity basis but ultimately Mr Vik, the paying party, had to pay only 70% of the costs of the detailed assessment. One of the reasons for that was that there had been some errors in the bill regarding the costs of the 'initial margin' which should never have been claimed. Rather than bending over backwards to get it right, those parts of the bill weren't corrected and the judge really did not think that was acceptable. That was a big reason why he was prepared to reduce the costs of the detailed assessment, but to lose 30% of your detailed assessment costs when you've been running it for that long is a big chunk of costs.

I can imagine that that risk didn't seem so obvious at the start of these proceedings. It's really a wakeup call, I think, to us all about what happens when you end up with these enormous bills and enormously lengthy detailed assessments and what can go wrong, even when things really looked quite good for the claimant when they started trying to put their bill together.

JMKC:

Andy what's your take on that, because you've got a lot of experience of putting together large bills, sometimes under pressure of time and sometimes without the best records underlying them. What's your take on this case? Did they have it coming to them or was it something that we should be terribly sympathetic with?

AE:

It's going to sound as if I'm sitting on the fence, but I think this is a very peculiar set of circumstances in high value commercial litigation. To have a paying party who refuses to engage in negotiations, who refuses to make any form of offer that might be accepted and insists on a line-by-line assessment of a bill this size. That is very unusual - which is why we haven't seen any reported decisions about how to go about it. It is why we always thought this was a really interesting case and from a distance we have been following it since the first directions hearing.

I am sympathetic to the receiving party here to the extent that it seems to me to be the way that litigation has gone.

Heavy litigation has been run mainly with electronic files for donkey's years and there isn't one standard for how to run it. There isn't something that resembles an old-fashioned paper case file and therefore the 'forensic archaeology' that is referred to here in a pejorative way is something that necessarily happens.

So, I'm sympathetic to the context in which this case was conducted. Where I think, easy to say with hindsight, but where strategically they went wrong was from the beginning. I disagree that in principle it is not necessary or not advisable to go to the court for directions, even before you draw a bill in a case this large, as to how you might go around it and how you might find a way to make the process more manageable.

Strategically I think the mistake they made is the one that Alicia alighted on right at the

beginning – which is that the paying party should, at the earliest possible stage, have a summary of controlled data that lassos the entirety of the costs, the size of the bill that they should be facing. That to me is fundamental and I think it was a tactical error to attempt to say – can we do it in chunks, can we do it in stages. In fact I think that the early directions hearing [costs] were part of the costs which were disallowed, even though there was never an offer on the table.

The other debate, which is a bit costs nerdy, but it comes up a lot on detailed assessment, is what do you do about block time recording? This is something that we face all the time because inevitably with cases like this, it's an enormous high value case that required a team, fully justified a magic circle firm etc. etc. As we all know, human nature is such that people will start to record their time on the basis that they have logged on to a job, they're clocking on in the morning, they're clocking off at night, maybe clocking off at lunchtime and back again and then there may be a list of things that they're doing that day, at best. The narrative field of a computerised time recording system has effectively replaced the attendance note that used to be on files.

You have the situation where, for day upon day, you can split those entries as you're probably required to do in a perfect sense, not only just to identify phase and task but also the activities that were going on. But an attempt to do that is always going to be educated guesswork. The time is contemporaneously recorded, that's not estimated. It's the apportionment of that time within various tasks and activities that is estimated. The debate, and I don't think there is a right answer to this because I think it's very fact sensitive, is, is it better to leave it as a block in the knowledge that you're going to have to produce an electronic or paper trail of evidence of work product that went on during that day so that the costs judge can take a view as to how much time they are going to allow out of the 11 hours that is claimed in that day? Or, have you got to split that up as the practice direction requires you to and treat it in a more granular fashion and

slightly more sporadically as it might appear throughout the bill.

I'm in favour of two ways of looking at it. Either a slightly more stand back generalised approach, or some form of sampling. Let's say that each side chooses six periods where they drill down into much more depth and then see if a pattern emerges. I think the latter course is quite a logical approach but, in this case, you can tell it would have fallen down because it requires a degree of co-operation between them. There was clearly none from the paying party so that would never have happened. I think that probably because Freshfields' approach started on the wrong premise, it was never going to end well. In terms of the day-to-day work of the costs lawyers, going back many years in terms of when the work was done, litigation teams could have been split up, gone to the four winds, people have moved on, it is very hard to do. However good the practice management systems are that law firms run, they are as good as the diligence that goes into organising them. There are going to be good days, bad days, well recorded cases, badly recorded cases.

JMKC:

I was going to ask you about practice management systems because in a sense part of the problem here seems to have been that you have, say, large block items with large amounts of time not justified. Someone has a go and says - well it's probably about this. Then they will produce some work product to show why it's about that and then you can't find it on the system. Is that common? Are some systems capable of doing that rather more reasonably?

AE:

I think a lot of systems are capable of it. We know more about it now than we might have done a couple of years ago because cloud systems now enable enterprise systems to be used by smaller firms. Without giving them an advert because I'm not actually their biggest fan, we now use iManage ourselves which is a document management system that probably half of the top 200 law firms

use. We can now access that even though we're very much a small enterprise.

What it's really good at is filing emails which most document management systems aren't and that's still how things run. A lot of people think emails are old tech now. In the same way that solicitors were the last people to give up faxing, they will also be the last people to give up email, but it's very good for that.

It's very, very good if used correctly for version control. Something that typically happens on large cases which is an iterative approach to the drafting of witness statements, pleadings, even key tactical and strategic correspondence; you can go through and unveil the different versions that have been worked on in draft which is quite important. It is exactly the sort of stuff that's important to produce on a detailed assessment when, for the 20th day in a row, somebody is saying - are you still working on that witness statement, what are you actually doing? There is an audit trail for it within the practice management system. Quite how you show that on a common platform to a costs judge is another quite difficult question and I'm probably hogging this conversation more than I should.

JMKC:

No, it's interesting, because you're the expert in this field.

AE:

The thing we are facing now all the time is that putting together a bundle of documents as the receiving party for a detailed assessment in a large case is a massive exercise.

You have to do it because otherwise you can't run the detailed assessment. It has to be done and I think that because we're still in the relatively early days of compilation of bookmarked and indexed large PDF files which is normally the format that these are going to court in now, costs judges reflect that slight newness and difficulty in a reasonably generous approach to how much time they are going to allow for it.

It all comes back to the costs of detailed assessment, which all goes into the costs benefit analysis of running a detailed assessment as opposed to ADR. *Deutsche Bank* is an extreme example because I haven't seen a case that big before where the paying party has decided to dig into the extent that this paying party has done.

Whether that has worked for them, I don't know, because we don't see the balance sheet at the end of the day - we may never do - of what the 70% that they have recovered in terms of their costs of detailed assessment means in cash terms. It is going to be a massive sum and how much that adds to the 70% that was recovered of the bill overall and whether it was worth it for the paying party. I would suggest it will still end up not having been worth it for the paying party. Nevertheless, a massive amount of unrecovered costs for the receiving party as well. It's a no-win situation it seems to me on either side.

JMKC:

I got the impression that it was revenge by Mr Vik who had been brought in as a non-party, but a third party under the third party costs order. If you like, the moving spirit behind the defendant being unsuccessful and so he thought, right, I'm going to get my own back and just take every single point.

In terms of lessons to be learned, I suppose the point of cases like this is that we can use hindsight and say, would it have been better for the receiving parties to sit down at the very beginning at the case and say - look guys this is a big thing, I want better time recording, for practice management systems to be adjusted in different ways or anything like that? Or is just one of those things you have to say, oh well, try to do better next time?

AE:

In a way it's a bit like when law firm clients come to us because relations have turned sour and there's going to be a Solicitor's Act assessment on a big bill. It's the opposite of the lottery, it's going to happen to somebody

at some stage and you've just got to deal with that. Whether that means that you fundamentally change your working practices because of the 100-year wave that comes along when you have actually got to do this. There's a big difference still between large commercial law firms who, let's face it, do not rely on inter partes costs for their income in the same way that personal injury practices do. The large well organised personal injury practices are probably a lot, lot better at recording their time in a granular and informative fashion because that's how they get paid. That's just real life isn't it. I don't see how this is going to lead to a change in behaviour, other than perhaps for the people that are directly involved in it.

Once you've been through a painful detailed assessment, from a self-preservation point of view you probably think 'from now on I am going to be slightly more assiduous or informative or structured about how I keep records or assign somebody to the team on a legal project management basis who oversees this sort of stuff (and is a pain in the backside to everybody for all the right reasons) all the way through the case'.

JMKC:

Having talked about personal injury firms, perhaps we should move on to our third topic which is qualified one-way costs shifting (QOCS) and some changes coming up there. Alicia.

AT:

This is an interesting topic potentially for people who don't do personal injury directly as their main area of work, because it is an area where there has been a huge amount of controversy and the Supreme Court said in [Ho](#), it's time for the Rules Committee to decide this, these are policy questions. There is always that tension when it comes to a complex area of costs law. At what point are the rules fundamentally the thing that needs to change rather than the Court's interpretation of those.

So it may be that we see a bit more of those sorts of comments being made by Judges,

that it is time for the Rules Committee to look at it again. Those of us who do practice in cases involving qualified one-way costs shifting will know this well. The intention was that there should be a system which allows there to be a limit on the costs that are paid out in personal injury cases and to try and make sure that both parties had a direct financial interest in the outcome. There would be some kind of sanction for litigant behaviour that would encourage the parties not to bring unworthy personal injury cases and would encourage settlement of those cases. What has happened has not necessarily led to that result. Instead, we have had enormous amounts of cases considering the limits of that qualified one-way costs shifting protection. We are expecting rule changes to come into force on 6 April. Until that point, on the law as it currently stands, defendants cannot enforce their costs orders against claimants in a number of situations where perhaps people would have thought they were able to:

- A defendant can't recover costs where a claimant has received sums which were paid out under a Tomlin Order ([Cartwright v Venduct Engineering Ltd](#)).
- A defendant can't set off defence costs against claimant's costs orders ([Ho v Adelenkum](#)) – the Supreme Court case I mentioned.
- A defendant can't recover costs in cases settled by way of a Part 36 Offer ([University Hospitals v Harrison](#))
- Often a defendant can't recover even where there has been a very late discontinuance, even sometimes where fraud is alleged but where fundamental dishonesty hasn't been proven.

A defendant's ability to recover their costs is extremely limited. There are some exceptions to QOCS which we don't need to go into here, but, fundamentally I think defendants have felt like they have had a bit of a rough deal under the QOCS protection scheme.

Under the new regime all of that will change, in theory. I think that what we are actually going to see are more disputes about this, but defendants should have the right to

enforce against costs awards made to the claimant and agreements to pay (settlement agreements). This will become particularly useful for defendants where they have won, for example, the costs of the detailed assessment. They might now be able to enforce that order for the costs of the detailed assessment. Or where, for example, the claimant has discontinued and a deemed costs order has been made.

One area that can pop up for personal injury cases that doesn't seem so obvious – I've had a couple of cases involving this – is in data protection situations. There are firms that encourage claims to be made against solicitors for data protection losses. Sometimes the heads of loss that they are claiming are actually for personal injuries. It is not your classic personal injury case, but you can end up with data protection obligations, facing a case where fundamentally your ability to settle it is quite limited because the claim is being made for personal injuries and you are caught within this QOCS protection scheme. Those sorts of cases have been quite challenging, I think, for solicitors. They are often covered by their own solicitors' insurance, but it can be quite a challenging situation. It is not the type of case where people have always had the assumption that they are going to be caught by QOCS protection and it can catch people out.

We are expecting – not just with data protection, but generally in personal injury cases – an avalanche of claims before these rules take effect because everyone will be trying to issue before 5 April.

There are number of issues that remain that we don't know the answer to.

One of them is, for example, how does this work in practice where there is a split between costs and damages? Let's imagine the claimant succeeds in obtaining an order for damages for £25,000 and an award of costs in the sum of £10,000. The defendant can set off any costs award against damages or costs. The solicitors acting for the claimant are then going to have some exposure, the question is how much? Should

the defendant's costs award be set off against the damages first, which would disadvantage the claimant client? Or should it be set off against the costs order first which would then put the claimants' solicitors' costs at risk before any damages are affected?

If it's the former the claimant loses out, but if it's the latter the solicitor loses out.

As far as I know on the draft rules, there's no clarity about how that will work in practice.

It's going to come down to the solicitor's retainer with their clients, I suspect, as to who is at risk first if the defendants are able to enforce their costs orders. It could make a big difference. You could see a claimant walking away with nothing or you could end up with a claimant walking away with quite a lot, but the solicitors having taken the hit. That could have quite a big impact on the viability of running these cases for those sorts of claimant personal injury firms.

JMKC:

Looking at the bigger picture, the Jackson scheme was that QOCS was brought in leaving claimants virtually immune to claims against any costs that were incurred and at the same time abolishing recoverability, particularly of ATE premiums, which is what claimants would otherwise have done to protect themselves against defendants' costs. Take away that scheme by making costs to which the claimants are entitled vulnerable to set off and therefore not being recovered, you change the balance, the dynamics, enormously. Although on one level it seems that what's sauce for the goose should be sauce for the gander, but claimants and defendants aren't in the same position. The whole point of Jackson's reforms was that defendants are generally large insurance companies etc.; claimants are not, and this is the balance that he sought to achieve. That seems to me to have been thrown out by this, so you will end up with a system where claimants are probably going to have to take out ATE insurance at great expense and be much more vulnerable to costs. Possibly it will be a deterrent to

bringing claims in the first place. I don't know. What's your view about that?

AT:

I think there are real risks here for claimants and claimant firms because there are a number of extra risks in bringing a case. One of the clear examples is bringing a case that looked like it had reasonable prospects at the start but where, over time, it becomes clear that the claimant is not going to win. On the rules as they currently stand you can discontinue with basically no real risk of having to pay out anything to the defendant. If you have a case where the claimant has a costs order that has covered some of the costs incurred so far, that costs award would be vulnerable to being offset by any deemed costs order in the defendant's favour.

The balance of risk is very, very different. People are going to be a lot more cautious about taking on claimant cases where they don't already have a clear understanding of the merits – and which requires a lot more upfront payments out to get expert evidence to bottom out on the more difficult aspects of the case. Fundamentally these cases are usually run on a shoestring, for lower value personal injury cases. Some are subject to fixed costs regimes. Even those that aren't, there's not such a huge margin that it's possible to run lots of cases and make a large profit on personal injury claimant work at the moment.

I think that you are quite right that there may well be a chilling effect on bringing personal injury claims. Obviously, defendants would be saying that if this is a problem then it's because these claims should never have been brought in the first place; strong claims would still succeed. But it does suggest that there might be more of a need for ATE cover. The problem is that the premiums for ATE are so high that I'm not sure that in a lot of these personal injury cases it could be justified, even if the case looks like a goer. Often the awards are simply not high enough to make it worth running those risks and taking out those ATE premiums.

It seems that the Rules Committee have completely accepted this as being a necessary step now for QOCS protection, so it will really change things potentially. Fundamentally it will be a fertile source of work for costs lawyers because there will be these disputes of principle that come up on the extent to which those changes operate.

One of those questions comes from the decision in [University Hospitals](#) where Lord Justice Coulson commented on the new rules (they weren't in force, of course, when he was making his decision) and it may be that the final version of the rule change will cover the point that he made - as things stand, [the new rules] talk about agreements to pay but they don't mention Part 36 offers. We expect that there will be a change to take into account Part 36 offers, but if there isn't then there's already a judgment saying that there's a question mark over how the rules will operate.

One thing I haven't really worked out how this will work in practice is where you have settlement offers in Tomlin Orders. Those are private to the parties involved and other people don't know the terms, so how could a co-defendant party to that Tomlin Order be able to enforce against it? They shouldn't know any of the terms at all.

It will be interesting to see how the personal injury market responds to this. To make this work I would expect that claimant personal injury firms will have to be very cautious about how much time they put into personal injury cases, particularly at the start because they're going to be at risk of not being able to recover their fees. It does make the business case for bringing those claims a lot more challenging.

For very large personal injury cases, these sorts of issues are going to be in the background; it's not going to stop people from bringing multi-million-pound personal injury claims. Those are unlikely to be affected and, I imagine for the people who might be listening who only deal with those very high value cases, then there would still be a good reason to bring those sorts of very high value claimant cases.

JMKC:

It's still another massive shake up for the claimant personal injury market.

AT:

Absolutely.

JMKC:

I suppose only about ten years after the last one.

AT:

Yes.

JMKC:

Also, I think with unforeseeable consequences. I mean foreseeable to a degree but how far the solicitors' market will be prepared to accept another hit, which is what it will be because it's their costs that are not going to be recovered – or are they going to be nice to the client and say, well look, we're not going to claim these costs off you, are the clients going to be able to afford it, even if they have to pay. It's a very, very difficult area. I think I'd probably have been happier if the Supreme Court decided a policy issue than the Rules Committee which doesn't give any reasons.

AT:

Yes, that's true.

I was just thinking it would be interesting to see if in other areas you have the Supreme Court or the Court of Appeal being prepared to direct things off to the Rules Committee, but it reminded me almost of [Belsner](#) where you have, again, personal injury cases leading to these big disputes on costs issues and looking very closely at the terms of those retainers. Of course, in that case we see the court saying you should be using the Legal Ombudsman, so maybe the court is hoping that there will be fewer disputes coming to them and we'll be going off to the Legal Ombudsman instead.

JMKC:

You'll still be sorting out the consequences of this particular rule change and it's nice to know that the costs lawyer won't be out of work.

AT:

That's quite right.

JMKC:

On that, unless anyone else has got anything they want to say, I'd like to thank Alicia very much for her very interesting talk this morning.

AE:

Thank you...thanks everybody.

ENDS



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