Costs Roundtable

Devonshire Club, 20 June 2019

JM

Good morning everyone and welcome to this Practico breakfast meeting. At the smaller ones we go around introducing ourselves, but this is really too big an occasion for that. Hopefully you've all had a chance to get to know each other or will do so afterwards.

Ben Williams QC is our guest speaker today. Most of you will know him. He is an absolutely top costs counsel and he's going to talk about a few cases and other points that we hope will be of interest to you all. I'm Jeremy Morgan QC. I used to be a costs barrister but retired to Italy and am now fighting about Brexit, which I will spare you from today.

Without further ado then, I will ask Ben to kick off. The first topic is –

Non-party costs orders including orders against third party funders

BW

Well, good morning everyone. It's a great pleasure to be here and it's very nice to see you. Many faces I know as well as some that I don't. If we get a chance to have a cup of coffee at the end that would be lovely as well.

Non-party costs orders were at one time exotic. More recently they can be described as merely uncommon.

"Non-party costs orders … a remedy that needs to be on every commercial litigator's palette."

Most commercial litigators will encounter one at some time or another and it seems to me that it's a remedy that needs to be on every commercial litigator's palette.

Just to set the scene, no one knew you could order costs against a non-party for several years after the Supreme Court Act was introduced.

Then in the late 1980's the House of Lords in *Aiden Shipping*[i] discovered that you could. It was left to the Court of Appeal to work out the details, which they did rather conservatively over about 15 years, initially through the emergence of exceptional cases, e.g. involving gross misconduct, people litigating oppressively or for ulterior motives.

In 2004 the judicial committee of the privy council found that 'exceptional' just means outside the normal run of cases where people pay for their own lawyers for their own interests[ii]. The availability of non-party costs orders extended to any appropriate case where there is some other party behind the nominal party which has a commercial interest in the outcome or is funding the case.

In 2006 Lord Justice Rix in a case called *Goodwood Recoveries*[iii] seized on this domestically and signalled what has since become a slow-motion explosion of non-party costs orders.

The area where there has been most expansion in recent times is costs orders against directors and shareholders in impecunious companies, which can be particularly important when the company is a defendant and you can't get security for costs against them.

"The area where there has been most expansion in recent times is costs orders against directors and shareholders in impecunious companies …"

Despite the Supreme Court in other contexts having reiterated the fundamental principle of separate corporate personality, in the context of costs the Court of Appeal seems to have entirely detached itself from those principles.

The effect is felt by somebody who owns an impecunious company, even when the litigation is being run in that company's interests. In recent cases, even if the owner has behaved completely appropriately, there have still been non-party costs orders. This is despite the fact that such orders probably would not have been made in similar cases where the company had a diffuse shareholding.

When the beneficial ownership happens to be concentrated in one person, or maybe one or two members of a family, and they derive such a discernible financial interest in the case succeeding, the court can and increasingly does make a non-party costs order against them.

This growth in non-party costs awards reached its zenith just over 18 months ago in relation to a Mr Bailey[iv], who was the owner of a company which only had one asset – which were possible rights in a documentary which had some un-shown footage of the Beatles. When he tried to exploit the film, he was injuncted by Sony. There was no dispute whatsoever that in defending the proceedings against his company he was acting perfectly reasonably on legal advice. Further, his company had a good case against Sony, supported by expert evidence, as to the law in the United States, for example, as to his company's rights of exploiting this documentary, at least in the United States.
He didn't fund the defence apart from a de minimis amount for disbursements, as his solicitors and counsel acted on full CFAs; itself a measure of how strong his lawyers thought the case was. Despite all of that, his company lost and Sony obtained a non-party

costs order against him. That was reversed in the Court of Appeal because Sony had never given him a warning that they might seek a non-party costs order, but the Court of Appeal said that was the only reason for upholding the appeal. It would still have been within the judge's discretion to make a non-party costs order had warning been given.

"I felt a burning sense of injustice for [Mr Bailey] ... if I had been advising him substantively in the intellectual property litigation, it would not have occurred to me to warn him that he was at risk of a non-party costs order."

One of the reasons why, when I represented Mr Bailey, I felt a burning sense of injustice for him, is that even as a specialist in this area, if I had been advising him substantively in the intellectual property litigation, it would not have occurred to me to warn him that he was at risk of a non-party costs order. And if it wouldn't have occurred to me, how on earth would it have occurred to somebody in general litigation practice? By extension, that would have left Mr Bailey in a disastrous position and with little prospect of success if he had tried to sue his former advisors for professional negligence in not warning him.

That is how commonplace these orders are potentially becoming and that's why I say, for anyone who litigates against insolvent companies particularly in the context where you can't get security, it's an important thing to have on your palette.

So, that's a very long run up to what is really a short point about costs orders against third party funders and the *Arkin* cap.

Even before the decision of the privy council in *Dymocks* and its incorporation into domestic law in *Goodwood Recoveries* in 2005, in general, if you funded a claim – unless you were doing it for pure goodwill – you would probably be exposed to a non-party costs order. That was a legacy of the court's ancient suspicion of people funding cases. There was always an exception for pure funders as they're called, which are people that fund cases, in essence, for charity. The courts have been quite liberal in interpreting what funding for charity or goodwill is. The most high-profile case is one of the cases involving Neil Hamilton and Mohamed Al Fayed[v].

Fayed won his libel case against Hamilton who had been bank-rolled by various people like Taki Theodoracopulos, the socialite, and by the Earl of Portsmouth, who were hardcore Tories who didn't like Mohamed Al Fayed. The courts would not take those aspects into account, interpreted the motives as goodwill to Mr Hamilton and did not make a non-party costs order.

I'm not sure the courts would be so generous today because of the general expansion of this regime, but I think you can still assume that where people are genuinely motivated by goodwill or charity they won't be exposed. If, however, you're funding for commercial reasons, and a classic example is where an insolvent company has no money but it has an asset and the funder is a creditor of the company who will be paid if the litigation succeeds, the likelihood of a non-party costs order is strong.

For commercial funders *Arkin*[vi] was a gift from Mars in that despite the obvious gains they would derive from litigation, the Court of Appeal did not want to stifle this nascent industry and introduced a cap on exposure to the extent of its funding. So, if the funder injects three million pounds its potential non-party costs liability is capped at three million pounds.

That was perhaps a generous decision at the time because, for example, it didn't examine the funder's potential return. If the funder was expecting to make a five-fold return on its investment why, therefore, should its liability on the three million pound example be limited to the three million rather than the fifteen million it expected to make?

Rupert Jackson didn't like the *Arkin* cap but thought that legislation would be needed to reverse it. Judges have clearly been dissatisfied and started carving out

exceptions - for example, that the *Arkin* cap is in addition to any money that a funder might put up by way of security.

"The Arkin cap does seem to be an historical indulgence to funders which might have been important at the time in order not to stifle the industry."

In the most recent case called *Davey*[vii] which I understand is going to the Court of Appeal, Mr Justice Snowden has really relegated the decision of the Court of Appeal to an indication of usual best practice or one possible approach, rather than any sort of rule of law.

It will be interesting to see what happens on appeal because I think you can make points either way. The *Arkin* cap does seem to be an historical indulgence to funders which might have been important at the time in order not to stifle the industry.

"I would be very surprised if the cap survives."

On the other hand, you do have what seems to me to be a very stark injustice to commercial funders who will have ordered their affairs on what seems to be a clear decision of the Court of Appeal, which was subsequently interpreted, albeit, extrajudicially, by somebody completely immersed in this field as being a rule that was sufficiently entrenched to need legislation to reverse it.
And, of course, such legislation would then be repealed prospectively not retro-spectively – so it wouldn't impact upon the way in which people have ordered their business affairs up to the point of the repeal.

I would be very surprised if the cap survives.

JM

There are, of course, cynics who say that most third-party funders have been preparing for the Arkin cap to be lifted for some time and they've been building that into their funding arrangements.

BW

I'm sure that is the case. After all, who is going to be better placed to attribute a monetary value to risk than a commercial litigation funder. It's the very nature of their business, and it was a risk.

Now, interestingly in the breast implant litigation[viii], the court made a non-party costs order against the insurer of some of the clinics that were defending the litigation.

You'll remember this was the litigation about sub-standard non-clinical silicone being used in surgical breast implants by a French corporation. The French corporation had no money and the claimants were left to sue clinics. Some of the clinics were small scale private operations that either didn't have insurance or had inadequate insurance, including insurance that the insurer was able to resile from contractually for non-notification and similar.

Some of them had robust insurance with Travelers. During the course of the litigation the clinics that were not insured remained parties, although they had a limited involvement. The insurers of some of those clinics who were not indemnifying were extremely unforthcoming in the litigation about whether they would indemnify. They took the orthodox approach that claimants aren't entitled to know about their opponent's insurance arrangements.

At the end of the case Mrs Justice Thirlwall made an order for the whole of the costs against Travelers on the basis that she considered that was just – given they had been funding the litigation for their insured and everyone else had just been tagging along. The Court of Appeal affirmed that order and subsequently the Supreme Court gave permission to appeal. Lord Sumption, who had granted permission, came back from retirement to sit on the appeal last week, and so there is some interest as to whether we're going to see a much more orthodox re-statement by the Supreme Court about making non-party costs orders, in insurance cases at least.

"... in the Court of Appeal ... we may yet see a correction to reinstate principles of separate corporate personality and such like ..."

We will wait and see but I do think, given the very rapid expansion of this jurisdiction at first instance and in the Court of Appeal, that we may yet see a correction to reinstate principles of separate corporate personality and such like and orthodoxy in the context of insurers and their contractual ability to limit their exposure.

Audience question

You mentioned the question of notification to funders and the importance of that in the context of impecunious companies whether it's a shareholder or such like. Do you think that given where the courts have gone in terms of commercial funders that notification to a commercial funder of the risk of the non-party costs order is as important?

BW

I think you're spot on to make the distinction. Firstly, the obligation to give notice has been said from the start to be relevant to the exercise of discretion. That goes right back to the Court of Appeal in a case called *Symphony Group*[ix] – back to the days of Lord Justice Balcombe.

Since then, I'm afraid it's been one of those factors that operates a sort of sweeping position in the football sense. It is wheeled out by the courts to justify an outcome when they don't want to make a non-party costs order and if they do want to make a non-party costs order they seem very happy just to swat it away as though it's just one of many factors in a multifactorial exercise of discretion.

And, of course, that ends up potentially becoming rather circular because if cases like *Bailey* stand the test of time then it may be that even in cases like that, future Mr Baileys will be assumed not to have needed notice of the risk of an NPCO.

Costs budgeting

JM

The next general topic we have is budgeting, which everyone has to live with these days. The first question is whether the rates set out in the costs budget can be overridden in the event of different rates being decided at the detailed assessment in respect of the non-budgeted element.

BW

"... one of the mysteries at the heart of cost budgeting is the approach to hourly rates."

What one might call one of the mysteries at the heart of cost budgeting is the approach to hourly rates. Firstly, the current practice direction very clearly says that judges are not expected to make judgments about hourly rates as part of the budget-setting exercise. It was always clear, however, that when budgeting takes place the court approves numbers by phase, and the data the court are supplied with in order to analyse numbers by phase are a multiplicand of an hourly rate and a multiplier of the number of hours.

In the most recent case on the subject[x] Mr Justice Jacob said that the budgeting judge will almost always make some sort of pre-estimate as to what the hourly rate should be, but it's not declared.

"Once the court approves a budget, it's a holistic exercise and just because a cost judge in due course takes the view that pre-budget costs need to have an hourly rate adjusted, it doesn't lead to any adjustment of the budget."

I'm pleased we have a little bit of clarity from *Yirenki*. Once the court approves a budget, it's a holistic exercise and just because a cost judge in due course takes the view that pre-budget costs need to have an hourly rate adjusted, it doesn't lead to any adjustment of the budget.

Interestingly *Yirenki* was not an appeal from a detailed assessment. It was an appeal from the Queen's Bench Master. The notion that the budgeting judge could approve a budget entirely without prejudice to the question of hourly rates being re-visited upon detailed assessment was quashed. I think it's a welcome development in the interests of certainty.

Yirenki, interestingly enough, is a case that's now going to the Court of Appeal on another issue which I just mention as, as an aside. It's a wonkish one, but nonetheless important to those who are affected by it.

I think sometime last year Mr Justice Birss decided that where somebody accepts a Part 36 Offer, which leads to a deemed costs order as you know, that meant that the court had no jurisdiction to award a payment on account of costs.

Because Part 36 was a self-contained code, there was no room for judicial intervention until you reached a late stage in the detailed assessment proceedings.

It is worth watching this space if the appeal is not compromised before reaching court.

The next case we have is about good reason to depart from budgeted costs. Most of you in this room know that it is now clear that where you do have budgeted costs you need a good reason to depart from budget, whether up or down.

"The two most obvious advantages of budgeting are certainty and the avoidance of detailed assessment."

Harrison[xi] made it clear it's not a one-way process. It's a two-way process. Once you have budgeted costs you get costs which are budgeted and if you advocate for costs below the budget you have to show a good reason just as much as if you advocate for costs above.

The two most obvious advantages of budgeting are certainty and the avoidance of detailed assessment.

There hasn't been a great deal of authority on good reason since, in *Harrison* the court unsurprisingly said they expect the cost judges to show a certain scepticism about being invited to depart from budget – to show a certain rigour.

There's quite an interesting case in the Central London County Court called Barts v Salmon[xii]. I appreciate that's far beneath the pay grade of most people in this room but it's still quite interesting; not least because, without meaning any disrespect, I think it's probably right to say that when you're appealing to a circuit judge on a costs point you're not necessarily appealing to a tribunal with less experience and acumen than when you appeal to a high court judge. You know circuit judges are dealing with costs day in, day out, in a way that high court judges aren't.

Often it is the case an experienced circuit judge can have quite a lot that's interesting to say about costs and I think the Court of Appeal recognised that. You do sometimes see them listening to what circuit judges say in a way that in other contexts they would just brush past.

"The question concerned when you depart from a budget for a good reason what does that mean?"

The case involved his Honour Judge Dight QC. The question concerned when you depart from a budget for a good reason what does that mean? Does it mean that you just have to disregard the budget and have a detailed assessment from the bottom up?

"... that is up to the costs judge and he has a broad palette."

Judge Dight held, in my view rightly, that is up to the costs judge and he has a broad palette. It may be that the good reason is such as to completely falsify the budget and in which case it is appropriate just to assess as if there had been no budget at all; but equally it may be the good reason is just such that the budget needs an adjustment.

For example, if the good reason is that there were five extra lever arch files of disclosure, then why do you need to reassess the whole of the disclosure phase rather than just looking at what are the additional costs which are reasonably proportionate and attributable to five extra lever arch files? I see no reason why a costs judge couldn't go on a completely broad-brush basis and say that he is allowing an extra amount or percentage increase.

The other point that was made was once you have found a good reason to depart from the budget does that mean all bets were off in a second sense, which is that there can be reductions for reasons other than the good reason which actually mandated the departure.

"Once there is a good reason you can just adopt a flexible approach to achieve an overall outcome which is proportionate."

Again, Judge Dight said that you can be flexible. Once there is a good reason you can just adopt a flexible approach to achieve an overall outcome which is proportionate. I think this is, albeit at a very low level of authority, quite a helpful development and will be followed by costs judges.

Part 36

BW

"Part 36, depending on which side of the argument you are on, is the gift that never stops giving or a point of constant frustration."

Part 36, depending on which side of the argument you are on, is the gift that never stops giving or a point of constant frustration. What we would like to think ought to be a straightforward and uncomplex process of making offers to settle, becomes endlessly complex and throws up endless issues.

One of the points I think which is now really coming into prominence is the concept of claimant's offers that were introduced by the Woolf reforms. Prior to that, there were a couple of judicial decisions that said if the claimant makes a *Calderbank* offer which is conspicuously reasonable, that might be a ground as a matter of discretion to award indemnity basis costs.

With Part 36 came the concept of the claimant's offer, used to allow indemnity basis costs, an additional 10% in damages, or costs in the context of assessment, and enhanced interest.

I think it's fair to say that from the start there has been judicial scepticism about claimant's offers which you just don't see towards defendant's offers. If a defendant made an offer and the claimant failed to better it by a penny, the defendant's offer would be given effect.

"We are beginning to see judges that say that a particular Part 36 offer was not really an offer to settle – more a demand that the defendant capitulates …"

For whatever reason, claimant's offers don't seem to quite have the same respectability. We are beginning to see judges that say that a particular Part 36 offer was not really an offer to settle – more a demand that the defendant capitulates, and with that refusing to give the Part 36 enhancements.

In a sense you can see where they're coming from because there is a category difference. The claimant starts with the advantage that unless they recover derisory damages, they will get their costs unless there's an effective offer.

A defendant has to displace that presumption, so it may be said a defendant's offer should operate as a fairly bright line whereas a claimant's offer may be surrounded by a sort of shadowy area. A question might arise as to whether or not a true attempt to compromise was made or just a demand of capitulation.

You could say that to issue particulars of claim and then offer to accept 1% less, you are really making a demand that unless the

defendant capitulates you get all these special enhancements. That doesn't really seem to be right. It seems that you ought to be giving something more away as a claimant in order to get these additional rewards.

There's an interesting case which looks like it's going to the Court of Appeal, involving the mobile phone operators against Ofcom[xiii]. As some of you may know, in 2015 Ofcom issued a new statutory instrument about the licence payments the mobile operators have to pay. It was quashed by the Court of Appeal, so the mobile operators' licence obligation reverted to the 2011 Regulations. There was a big dispute about how much compensation Ofcom had to pay.

The claimants essentially won in front of the deputy Judge, Adrian Beltrami QC, and there were a series of Part 36 Offers. Telefónica made a very early offer to settle but at the point they offered to settle, all it involved was a waiver of interest – but interest was substantial. They then made a second offer which again involved a waiver of interest by which time interest had become very substantial. Telefónica then amended their claim to enlarge it so, the offer made became one – still capable of acceptance – that represented a greater discount on the claim. No offer was accepted.

Adrian Beltrami at the end of the case accepted these were genuine offers, but he held that it would be disproportionate to give enhanced interest. He awarded indemnity basis costs, plus the extra 10% capped at £75,000, which in this case was de minimis. He did not award the interest because that potentially would have amounted to several million pounds.

"… how far the claimant has to go to make a genuine offer is a very interesting question, but it does give rise to the very uncertainty which in other contexts Part 36 keeps being amended to try to remove."

The overall battle as to how far the claimant has to go to make a genuine offer is a very interesting question, but it does give rise to the very uncertainty which in other contexts Part 36 keeps being amended to try to remove.

Some of you will remember that there used to be a principle of near miss. There was a case called *Carver v BAA* which was widely felt to do justice in individual cases but to be a disaster in policy terms because it led to you not knowing as a claimant or defendant whether your Part 36 Offer would be effective.

Now we suddenly have a new area of uncertainty where the court may consider whether the claimant's offer is a genuine offer to settle. What is a genuine offer? Is it 5% discount, 10% discount … does the court need to get into the underlying merit and take a view on how real the offer was as a reflection of litigation risk?

If it goes to the Court of Appeal, it would be interesting to see what they say.

In the meantime, if you are acting for a claimant then I would not feel secure in getting my Part 36 enhancements in the current first instance climate unless there is some concession which is more than de minimis in the context of the litigation.

Proportionality

BW

"… people have been in vain waiting for the Court of Appeal to explain what the new proportionality test means."

In much the same way as the quest for the Holy Grail, people have been in vain waiting for the Court of Appeal to explain what the new proportionality test means. It has always struck me as a vain hope because it is, in its nature, both flexible and nebulous. It is a matter of impression and from that point of view it might be said that it's a slightly extraordinary thing for the courts to have introduced.

At the same time there have been lots of other areas in which they have been working to increase certainty in the context of costs. The result is an increase in certainty for things like budgeting, but then a costs judge may apply proportionality at the end of the case when he or she now seems to have been given a discretion to do pretty much what they like.

Some cases have gone to appeal, and lots of these are just first instance appeals that tell us very little.

The recent case before Mr Justice Marcus Smith[xiv] is a helpful case in some ways in that he deals with some prosaic but important points including that in determining the proportionate figure you do not take into account VAT, and that the budget won't have included the costs of drawing the bill itself and so on.

However, part of his decision is entirely case specific as he says that the costs judge allowed costs which were not, in fact, incidental to the application whose costs the claimant was awarded. He also does say that that the costs judge allowed far too much in the way of costs for a type of application under the Companies Act that he would have been far more familiar with than the costs judge.

"... the only answer lies in the rule, wherein costs must bear a reasonable relationship to the issues in the case which are not just the money."

I think still it is quite difficult to see it as anything more than an illustrative decision as to the powers the courts have. You cannot discern any issue of principle and if there is a question, the only answer lies in the rule, wherein costs must bear a reasonable relationship to the issues in the case which are not just the money.

There may be other issues, e.g. complexity, if it's a London case or a non-London case, a City case or a non-City case. All circumstances have to be combined with the fact that we do know it is no longer enough to say 'this is what I needed to spend' because necessary costs are no longer something to which you're automatically entitled.

"... there's nothing in the practice direction that says the court must not allow necessary costs, and so it remains open ..."

That said, there's nothing in the practice direction that says the court must not allow necessary costs, and so it remains open and I think it would be the instinct of the vast majority of judges in our tradition to think that if the receiving party needed to incur these costs in order to have access to the judge, then it's very difficult to see how they can be disproportionate.

The rule makes life extremely uncertain and in smaller money cases, in particular, there may be an incentive to some people to go to detailed assessment in the Micawberish hope that something will turn up on the basis of proportionality at the end.

"... there is a far greater margin of error ..."

Where this would probably bear most of all is in trying to give parties advice on the point at which they should settle. You are going to have to say to parties both paying costs and receiving them that ultimately this test for proportionality means there is a far greater margin of error than there might be, for example, if you were giving advice on settling a damages case where you'd look at the expert evidence or you look at the disclosure and you may say ' I think that this is the most likely outcome'.

"... it's a known unknown ..."

The difficulty here is you can look at all the materials that you have and you can come to a figure but you then know that figure is surrounded by this great margin of error as to what the costs judge will make of proportionality.

If it's a case perhaps about right to life, or it's a case about a billion pounds, then you can be fairly confident that proportionality is not

going to play a very big role, but in cases where there is a disequilibrium between the damages and the costs, it's a known unknown and I'm afraid I think it's going to remain a known unknown.

JM

Thank you all so much for coming. It's been a really interesting session and thank you to Ben for the most wonderful flow of analysis and overview of what's going on at the moment in the costs arena.

[i] *Aiden Shipping Co Ltd v Interbulk Ltd (The 'Vimeira')* [1986] 2 All ER 409
[ii] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others* [2004] UKPC 39
[iii] *Goodwood Recoveries Ltd v Breen* [2006] 2 WLR 2723
[iv] *Sony/ATV Publishing LLC v WPMC Ltd (in liquidation)* [2018] EWCA Civ 2005
[v] *Hamilton v Al Fayed (No 2)* [2003] 2 WLR 128
[vi] *Arkin v Borchard Lines Ltd and Ors* [2005] EWCA Civ 655
[vii] *Davey v Money & Ors* [2019] EWHC 997 (Ch)
[viii] *Travelers Insurance Company v XYZ* [2018] EWCA Civ 1099
[ix] *Symphony Group plc v Hodgson* [1993] 4 All ER 143
[x] *Yirenki -v- Ministry of Defence* [2018] EWHC 3102 (QB)
[xi] *Harrison -v- University Hospitals Coventry & Warwickshire Hospital NHS Trust* [2017] EWCA Civ 792
[xii] *Barts Health NHS Trust v Salmon*, Central London County Court, 17 January 2019 (unreported)
[xiii] *Vodafone and others v The Office of Communications* [2019] EWHC 1448 (Comm)
[xiv] *Malmsten v Bohinc* [2019] EWHC 1386 (Ch)

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Stephen Critchley	Collyer Bristow
Sivan Daniels	Addleshaw Goddard
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