

PRIVATE LAW FOR PUBLIC LAW PRACTITIONERS
PUBLIC LAW PROJECT CONFERENCE 24TH JUNE 2015

COSTS AND FUNDING

Introduction

1. These notes briefly address 3 related issues to be considered from the point of view of the start of and early stages of a case:
 - (1) Paying for a Claimant's own costs.
 - (2) Minimising liability for an opponent's costs.
 - (3) Maximising recovery of a Claimant's costs in the event of success.

2. They do not address questions of assessment of costs at the end of case.

Funding sources for a Claimant's own costs

Legal aid

Scope

3. Areas within the scope of civil legal aid are now exhaustively defined in Schedule 1 of the Legal Aid Sentencing and Punishment of Offenders Act 2012. Further details and commentary are available in

The Bar Council guide at

http://www.barcouncil.org.uk/media/293931/2014.06.11_civil_legal_aid_-_practical_guidance_for_the_bar_v3.0_final_merged.pdf¹

¹ Note that this link is to the June 2014 edition. It is shortly to be updated.

Legal Aid handbook resources page – <http://legalaidhandbook.com/laspo-resources/>

The Lord Chancellor's Guidance on Civil Legal Aid (Jun 2014) Ministry of Justice - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332795/legal-aid-lord-chancellors-guidance.pdf

4. Where directions are given that a judicial review claim is to continue as if started by ordinary proceedings then it is no longer treated as a judicial review claim for the purposes of paragraph 19 of Part 1 of Schedule 1. It must qualify for funding under one of the other headings.
5. Part 2 of schedule 1 generally excludes civil legal aid for claims for personal injury or death (1), negligence (2), assault battery or false imprisonment (3), trespass to goods (4), trespass to land (5), damage to property (6), defamation and malicious falsehood (7), breach of statutory duty (8), claims for damages for breach of Convention Rights (12), business losses (14). Some of these exclusions are disapplied where legal aid is available in the categories in Part 1 of Schedule 1.
6. Those most likely to be used in this context are:
7. *"21 Abuse of position or powers by public authority*

Civil legal services provided in relation to abuse by a public authority of its position or powers.

- (1) By para 21(4) "an act or omission by a public authority does not constitute an abuse of its position or powers unless the act or omission— (a) is deliberate or dishonest, and (b) results in harm to a person or property that was reasonably foreseeable".

(2) *R (Sisangia) v Director of Legal Aid Casework* [2015] 1 WLR 1891 (appeal pending) establishes that it is only the relevant act that has to be deliberate (in that case an arrest) and not the lack of legal authority that is said to make it abusive.

8. *“22 Breach of Convention rights by public authority*

(1) *Civil legal services provided in relation to—*

(a) *a claim in tort, or*

(b) *a claim for damages (other than a claim in tort),*

in respect of an act or omission by a public authority that involves a significant breach of Convention rights by the authority.

9. But there are a number of other headings allowing for the grant of legal aid that may also be relevant in their area. They include:

(1) Paragraph 3 – abuse of children or vulnerable adults

Civil legal services provided in relation to abuse of an individual that took place at a time when the individual was a child or vulnerable adult...”

Abuse is defined as: physical or mental abuse, including—

(a) sexual abuse, and

(b) abuse in the form of violence, neglect, maltreatment and exploitation.

(2) Paragraph 32 Victims of trafficking in human beings

“Civil legal services provided in relation to a claim for damages arising in connection with the trafficking or exploitation of an individual who is a victim of trafficking in human beings...”

(3) Paragraph 37 - Protection from harassment

Civil legal services provided in relation to—

- (a) an injunction under section 3 or 3A of the Protection from Harassment Act 1997;
- (b) the variation or discharge of a restraining order under section 5 or 5A of that Act.

(4) Paragraph 39 Sexual offences

Civil legal services provided in relation to a sexual offence, but only where—

- (a) the services are provided to the victim of the offence, or
- (b) the victim of the offence has died and the services are provided to the victim's personal representative.

(5) Paragraph 43 Equality

Civil legal services provided in relation to contravention of the Equality Act 2010 or a previous discrimination enactment.

Financial Eligibility

10. Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013

For most civil legal aid the eligibility limits (Regs 7 and 8 and 44) are:

- (1) Monthly disposable income £733 or gross income of £2657.
- (2) Disposable Capital £8,000 but the client must contribute any capital between £3,000 and £8,000.

11. Contributions from income start to be payable where disposable income exceeds £311 [Reg 44].
12. These limits can be disapplied and/or contributions waived in multi-party actions where there is a significant wider public interest or in inquests (Regs 9 and 10).
13. The Regulations make detailed provision as to how income and capital are to be calculated including the circumstances in which the resources of a partner or other person will be taken into account.

Merits Criteria

14. The Civil Legal Aid (Merits Criteria) Regulations SI 2013/104 set out conditions that have to be met before a case can be funded. For full representation to be granted² then the standard criteria (Reg 39) must be met in all cases except where excluded.

They are:

- (a) the individual does not have access to other potential sources of funding (other than a conditional fee agreement) from which it would be reasonable to fund the case;
- (b) the case is unsuitable for a conditional fee agreement;
- (c) there is no person other than the individual, including a person who might benefit from the proceedings, who can reasonably be expected to bring the proceedings;
- (d) the individual has exhausted all reasonable alternatives to bringing proceedings including any complaints system, ombudsman scheme or other form of alternative dispute resolution;

² The criteria are modified for investigative help.

- (e) there is a need for representation in all the circumstances of the case including—
 - (i) the nature and complexity of the issues;
 - (ii) the existence of other proceedings; and
 - (iii) the interests of other parties to the proceedings; and
- (f) the proceedings are not likely to be allocated to the small claims track.

15. Where the claim is one under paragraphs 21 or 22 of Part 1 to Schedule 1 of LASPO (ie abuse of power or breach of convention rights) then the merits must be above 50% [Reg 43] and the proportionality test must be met i.e. the “Director is satisfied that the likely benefits of the proceedings to the individual and others justify the likely costs, having regard to the prospects of success and all the other circumstances of the case.” [Reg 8]

16. In other cases then:

- (1) If the claim is a money claim then the cost benefit criteria in Reg 42 must be met:

Chances of success	Ratio of damages:costs
80% +	1:1
60-80%	2:1
50-60%	4:1

17. This does not apply if the claim is not mainly a money claim or if it is a money claim but it is of significant wider public interest. In those cases the Director must be “satisfied that the potential benefit to be gained from the provision of civil legal services justifies the likely costs, such that a reasonable private paying individual

would be prepared to start or continue the proceedings having regard to the prospects of success and all the other circumstances of the case.

18. Special rules also apply to multi-party actions. Legal aid will only be available (and then subject to any other relevant conditions) if the likely damages exceed £5,000 [Reg 41]. This does not apply if (a) the client is the lead case and (b) the Director is satisfied that the case is of significant wider public interest.

Exceptional Funding

19. If a case is not eligible for legal aid then in principle exceptional funding may be available under s. 10 of LASPO. S. 10(3) sets out the general rule:

“(3) For the purposes of subsection (2), an exceptional case determination is a determination—

- (a) that it is necessary to make the services available to the individual under this Part because failure to do so would be a breach of—
 - (i) the individual's Convention rights (within the meaning of the Human Rights Act 1998), or
 - (ii) any rights of the individual to the provision of legal services that are enforceable EU rights, or
- (b) that it is appropriate to do so, in the particular circumstances of the case, having regard to any risk that failure to do so would be such a breach.”

20. The Lord Chancellor has given guidance on this at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434450/legal-aid-chancellor-non-inquests.pdf

21. But this must be read subject to *R (Gudanaviciene) v Director of Legal Aid Casework* [2015] 1 W.L.R. 2247 CA holding that the guidance was wrong to suggest that exceptional funding should only be granted in rare or extreme cases. If there will be

a breach then funding must be granted. Otherwise the director must have regard to all of the circumstances including the risk of a breach.

22. Since this case the latest available LA statistics (Oct – Dec 2014) show that around a quarter of applications for ECF are granted³.

23. As to inquest funding:

(1) Advice (but not representation) about an inquest is in scope (LASPO Schedule 1 Part 1 para 41).

(2) Exceptional funding can also be granted under s. 10 where the client's Convention Rights require it and additionally under s. 10(5) where the director has made a determination that:

“in the particular circumstances of the case, the provision of advocacy under this Part for the individual for the purposes of the inquest is likely to produce significant benefits for a class of person, other than the individual and the members of the individual's family”.

24. The Lord Chancellor has given guidance on this at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309099/legal-aid-chancellor-inquests.pdf

25. In *R (Letts) v Lord Chancellor* [2015] EWHC 402 (Admin) Green J held that the guidance s. 10(2) and inquests was wrong to the extent that it suggested that it was always necessary to show an arguable breach by the state for the investigative duty to arise.

The statutory charge

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/417157/Legal-aid-statistics-bulletin-oct-dec-2014.pdf

26. This applies whenever a legally aided party recovers or preserves property as a result of proceedings – LASPO s. 25. The property is charged with the “amounts expended by the Lord Chancellor in securing the provision of the services”
27. There is a power to waive all or part of the statutory charge in a case of significant wider public interest – Legal Aid (Statutory Charge) Regulations 2013 Reg 9.

Other funding sources

Private retainer

28. This can cover any contract with the client covering the claim and can include a variety of payment arrangements including payment at an hourly rate, fixed fees or a combination of these.
29. Where a person is or may be eligible for legal aid then they must be advised of this before entering a private retainer and where somebody is in receipt of legally aided services then a provider cannot take any other payment “in respect of the services” unless authorised by the Lord Chancellor (LASPO s. 28(2)). However, this does not prevent a private retainer (for example a CFA) for parts of the case that are not covered by legal aid. So, for example, in the case of a claim arising out of a death there might be several types of funding including legal help, exceptional funding for the inquest, a full representation certificate where aspects of the claim are in scope, and a CFA for the remainder.
30. Note in particular the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 which require certain information to be given including information about a right to cancel in some cases, where a contract is entered into

on business premises, off business premises in the physical presence of the parties and in some distance selling cases.

Conditional Fee arrangements

31. Law Society Guidance including a model CFA:

<http://www.lawsociety.org.uk/support-services/advice/articles/new-model-conditional-fee-agreement/>

32. Bar Council Guidance including various model CFAs

http://www.barcouncil.org.uk/media/201555/guidance_for_barristers_and_clerks_relating_to_privately_funded_civil_litigation.pdf

33. CFAs are permitted for civil proceedings⁴ by s. 58 of Courts and Legal Services Act 1990 as amended which defines a CFA as (s. 58(2)(a)):

“a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances”

34. Within this language various types of agreement are contemplated including:

(1) A traditional CFA – no costs are payable by the client unless there is success at which point there is a liability to pay whether or not costs are recovered from the opponent.

(2) A “CFA lite” – the client will not be required to pay any costs except to the extent that they are recovered from the opponent.

⁴ They are not permitted for criminal or some family proceedings by s. 58A.

(3) A “discounted CFA” – the client is obliged to pay an amount less than the ordinary rate payable but it liable to pay the full amount in the event of success. This is not the same as a success fee.

35. Most CFAs provide for the client to pay disbursements (other than counsel’s fees) but it is permissible for the solicitor to meet those costs and that does not make the agreement void (*Flatman v Germany* [2013] EWCA Civ 278).

36. Success fees are defined in s. 58(2)(b):

“a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances”.

37. A success fee cannot be more than 100% in any case (Conditional Fee Arrangements Regulations 2013 Reg 3).

38. In personal injury claims a success fee cannot be more than 25% of the damages awarded for pain suffering and loss of amenity together with past pecuniary loss in proceedings at first instance or 100% of those amounts in other proceedings (Conditional Fee Arrangements Regulations 2013).

39. Success fees and insurance premia are no longer (since April 2013) recoverable from the opponent except in certain types of transitional case including:

- (a) defamation;
- (b) malicious falsehood;
- (c) breach of confidence involving publication to the general public;
- (d) misuse of private information; or
- (e) harassment, where the defendant is a news publisher.

This was intended to cover media claims but may also cover certain claims against public bodies.

Damages based agreements – Courts and Legal Services Act 1990 s. 58AA

40. These agreements allow for payments to lawyers to be determined “by reference to the amount of financial benefit obtained”.
41. The amount cannot (including VAT) be more than 50% of the sums recovered by the client and 25% in PI claims. The Damages Based Agreements Regulations 2013 set out a series of complex formal requirements.

Before the event (BTE) insurance

42. Many clients have insurance policies (usually household or car insurance) that provides legal expenses cover. If available this covers both the costs of bringing the claim and any adverse costs liability. However there are various limitations:
- (1) Such policies often require clients to proceed with the insurer’s own panel insurer. The Insurance Companies (Legal Expenses Insurance) Regulations 1990 allow a choice of lawyer but the financial ombudsman service interprets this as meaning after proceedings have started⁵.
 - (2) Cover is usually subject to fairly modest financial limits.
 - (3) Claims against public bodies for matters like false imprisonment or trespass are often either not covered or are expressly excluded.

Crowd funding

43. Some cases are attracting funding via this route – see e.g. www.crowdjustice.co.uk

⁵ <http://www.financial-ombudsman.org.uk/publications/ombudsman-news/26/legal-expenses-26.htm>

Limiting liability for the other sides costs

After the event [ATE] Insurance

44. Before 1st April 2013 and when insurance premia could be recovered in the event of success most types of claim could be insured through the ATE route. The market has now contracted and, for example, insurance for civil actions against the police is generally unobtainable.

Qualified one way costs shifting - QOCS

45. This is introduced for personal injury claims with effect from 1 April 2013 by CPR 44.13-17 and PD 44.12. It does not apply where a pre-April 2013 CFA is in existence [44.17]. It “applies to proceedings which include a claim for damages-

(a) for personal injuries;

(b) under the [Fatal Accidents Act 1976](#); or

(c) which arises out of death or personal injury and survives for the benefit of an estate by virtue of [section 1\(1\) of the Law Reform \(Miscellaneous Provisions\) Act 1934](#)”

46. The reference to “damages” does not identify the cause of action so this will apply to claims for a monetary award by way of just satisfaction under the HRA provided the conditions in (a) to (c) are made out.

47. Personal injuries will probably not include personal torts such as false imprisonment or trespass to the person where they are not accompanied by some physical or psychiatric injury.

48. The effect is that:

Costs orders may be enforced against a claimant without the court's permission in the following cases:

(1) Up to the amount of any order for damages or interest awarded to the claimant [44.14]. This will mean that a Claimant will have to pay any adverse interim costs orders out of their damages and will still be subject to a costs penalty if they do not beat a Part 36 offer.

(2) Where the proceedings have been struck out on the grounds that (a) the claimant has disclosed no reasonable grounds for bringing the proceedings; (b) the proceedings are an abuse of the court's process; or (c) the conduct... likely to obstruct the just disposal of the proceedings [44.15].

(a) Enforcement under this provision is not limited to the amount awarded to the Claimant.

(b) This caused much concern when these changes were being introduced because some of the most significant cases in this field are litigated at the point of strike out (*Michael v CC South Wales Police* [2015] 2 W.L.R. 343 being a recent example). However, this does not apply where summary judgment has been given and it is not clear how it applies if part of the claim has been struck out.

Costs orders may be enforced against a claimant to the full amount with the court's permission if:

(3) "the claim is found on the balance of probabilities to be fundamentally dishonest" [44.16]

(4) “to the extent that [the court] considers just, where-

(a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of [section 1\(3\) of the Fatal Accidents Act 1976](#) (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or

(b) a claim is made for the benefit of the claimant other than a claim to which this Section applies. [44.16(2)]

49. 44.16(2)(a) covers matters such as credit hire claims and subrogated claims.

44.16(2)(b) is of most relevance in this context. It covers a case where the claim is within the QOCS regime because it includes a PI claim but some other claim is made. It will, for example cover a case where a false imprisonment claim is made as well as a claim for assault causing injury. There is as yet no authoritative guidance on how this will operate. Costs & Funding following the Civil Justice Reforms Questions & Answers⁶ suggests that the courts will readily make a costs order for a non-PI element where that is the dominant part of the claim or can easily be identified:

“By virtue of CPR 44.16(2) the mere fact that procedurally, the claim as a whole is deemed a personal injury claim, because it includes a claim for damages for personal injury, does not prevent the court disapplying QOCS, to the extent just. Commonly, this is likely to be used so that the court can allow full enforcement of adverse costs orders in relation to that part of the claim which was not a personal injury claim, and is likely to be used in cases where the personal injury claim is viewed as being the more modest or less complex part of the claim. An example might be a professional negligence claim which included an ancillary claim for damages for personal injury”.

6-12

“Q1. How will QOCS apply where a claim compromises both a personal injury and a non personal injury element?”

This will have to be the subject of judicial guidance in due course. The rule expressly allows the court to disapply QOCS to the extent that it considers just where this situation arises (CPR 44.16) and the Practice Direction envisages that where this

⁶ Part of the White Book 2015.

arises the court will normally order the claimant to pay costs notwithstanding that they exceed the level of damages and interest awarded (i.e. will allow enforcement beyond the limit in CPR 44.14, which is what CPR 44.16 expressly envisages).

In practice, it is likely that the court will seek to identify the true nature of the claim. Where the personal injury claim was dominant and the 'additional claim' a modest ancillary part which is unlikely to have significantly increased the costs then the court may decide not to allow any enforcement beyond CPR 44.14. Where the 'additional claim' was dominant, then the court may allow full enforcement. Perhaps more commonly, the court may seek to identify, by percentage, date or in some other way, the 'additional claim' and allow enforcement in that regard accordingly.

Given that the claimant in this scenario will already probably have suffered some costs deduction against damages (CPR 44.14) and given that the quantum of costs may have been assessed (CPR 44.13(3)) the court may simply make an order that enforcement of a certain sum above the level of damages is just. The Court of Appeal is unlikely to be keen to interfere with a broad exercise of discretion here unless the outcome is manifestly unjust" – 6-15.

Costs capping CPR 3.19 PD 3F

50. Costs budgeting is noted below but one option open to the court is to impose a costs cap where it is in the interests of justice to do so, there is a substantial risk that without such an order costs will be disproportionately incurred, that risk cannot be adequately controlled by case management or assessment. Such an Order is likely to be exceptional (PD 3F). In *Black v Arriva North East Ltd* [2014] EWCA Civ 1115 Christopher Clarke LJ refused an application for a £50,000 cap in the court of appeal where otherwise the claim would not be pursued saying "it does not seem to me to be the function of costs capping orders to remedy the problems of access to finance for litigation".

Maximising recovery

The width of costs "incidental to"

51. Costs of proceedings may be significantly wider than the costs directly incurred in conducting the claim itself. It is, for example, now well established that costs incurred in an inquest are capable, in principle, of being also the costs of a civil claim arising from the death and however the civil claim is framed (e.g. negligence, breach of statutory duty, breach of contract or under the HRA). This was explained in *Roach v Home Office* [2010] QB 256 which followed *The Bowbelle* [1997] 2 Lloyd's Rep 196 and *Re Gibsons's Settlement Trusts* [1981] Ch 179. Megarry VC's reasoning in the last case was summarised in *Roach* at para 29:

"His review of the authorities led him to conclude [1981] Ch 179, 186H, that there were at least three "strands of reasoning" to be applied: that of proving of use and service in the action; that of relevance to an issue; and that of attributability to the (paying parties') conduct. He then helpfully explained that at some length".

52. This 3 fold test is also applicable to other investigations or processes that that may arise. So, in an appropriate case and subject to proportionality it may be possible to recover the costs of participating in an IPCC investigation (*Dissi v MPS* – 4 Jun 2009 SCCO Master McKay, *Niering v MPS* 26 Jul 2009 SCCO Master McKay, Lynch) or attendance at disciplinary proceedings. In particular proceedings (see *Lynch v CC Warwickshire Police & ors* JR 1305127, Master Rowley)

Costs budgets 3.13-3.19 & PD 3E

53. Costs budgets are a key part of the Jackson reforms under which the courts are expected actively to manage the case and the costs incurred by the parties with a view to ensuring that the costs of each stage are proportionate. Budgets are to be exchanged following precedent H 7 days before the first CMC [CPR 3.13] and the court will ordinarily make a costs management order either recording agreement re the budget or revising and approving the budget [3.15]. The court can refuse to approve a budget but then the effect is that all issues are dealt with on assessment and so this is not a favoured option (see *CIP* below).

54. The budget is in respect of costs “to be incurred by any party in the proceedings” and it follows that costs already incurred are not subject to that process. However, if costs already incurred are disproportionate then that may be taken into account in setting the budget for the rest of the proceedings and the court may record its comments on those costs [PD3E 7.4].

55. Budgets may be revised but only prospectively and where there is some good reason to depart from the earlier budget – *Elvanite Full Circle Ltd v Amec Earth & Environmental (UK Ltd)* [2013] EWHC [1643] TCC. It will not normally be possible to revise a budget to correct an earlier mistake – *Murray v Dowlman Architecture Ltd* [2013] EWHC 872 TCC. *Excelerate Technology Ltd v Cumberbatch and ors* [2015] EWHC 204 QB shows that if additional costs have been properly and unforeseeably incurred without an amendment then the court can still record a note about the costs with a view to those costs being allowed on assessment.

56. By 3.18:

“In any case where a costs management order has been made, when assessing costs on the standard basis, the court will-

- (a) have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and
- (b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so”.

Fixing the budget

57. There is still relatively little case law on this and very little on the detail as to how a budget should be set:

- (1) Contingencies should be included if they are “more likely than not to be required” and where the kind of work can be identified yet not fall within one of the other categories (Yeo at para 71). Unanticipated developments should be dealt with elsewhere:

“If the improbable occurs, in the form of an unexpected interim application, the costs will be added to the budget pursuant to PD3E 7.9, unless the matter involves a “significant development” within para 7.4 in which case, if time permits, a revised budget should be prepared and agreed or approved” [ibid].

- (2) PD3E 7.3 states that “When reviewing budgets, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs”. This suggests a fairly broad brush approach where the court will only reject a budget as disproportionate in an obvious case. In deciding whether something is proportionate it is crucial to recognise that the sums at stake are only one factor, the others being those in CPR 44.3(5)⁷. As the Final Jackson Report put it:

“Proportionality of costs is not simply a matter of comparing the sum in issue with the amount of costs incurred, important though that comparison is. It is also necessary to evaluate any non- monetary remedies sought and any rights which are in issue, in order to compare the overall value of what is at stake in the action with the costs of resolution”⁸.

⁷ Costs incurred are proportionate if they bear a reasonable relationship to-

- (a) the sums in issue in the proceedings;
- (b) the value of any non-monetary relief in issue in the proceedings;
- (c) the complexity of the litigation;
- (d) any additional work generated by the conduct of the paying party; and
- (e) any wider factors involved in the proceedings, such as reputation or public importance.

⁸ Chapter 3 para 5.5 cited in Costs & Funding Questions & Answers.

58. The cases have suggested that first instance judges have a wide discretion here. They are entitled (particularly where extensive costs have already been incurred) to start from an overall view of what the (proportionate) costs of the claim ought to be and to work back from there (see e.g. *Redfern v Corby* BC QBD 3 Dec 2014 HHJ Seymour QC). Where excessive costs have already been incurred then that may mean that later costs are approved at a lower level than they would otherwise be.

59. There remains a difference of view about whether the budget should be set by reference to hourly rates. In some case courts have undertaken a relatively in depth detailed assessment of hourly rates – *Yeo v Times Newspapers* [2015] 2 Costs LR 243 and *Havenga v Gateshead NHS Foundation Trust Newcastle District Registry* 26 Nov 2014.

Unbalanced costs budgets between C and D

60. In *CIP Properties (AIPT) Limited v Galliford Try Infrastructure Limited* [2015] 2 Costs LR 363 Coulson J rejected an argument that the defendants had an incentive artificially to depress their costs as an “unwarranted accusation” [24]. But the facts of that case were unusual and he thought the Claimants were arguably guilty of presenting a schedule with many contingencies “designed to ensure that the claimant's legal team is not limited to the already vast costs in the budget document, and can come back under a vast range of heads in order to claim more than the amount in the costs budget”.

61. At para 49 he accepted that there may be some case where the lion’s share of the work has to be done by the CC: “where the claimant has to do much of the work and the defendant can sit and snipe on the sidelines”.

62. In *Havenga* (above) counsel for the Trust was recorded as making the following concession in a clinical negligence case:

“it is inevitable in a case such as this that the appellant's solicitors will need to spend substantially more time on case preparation and in looking after the family, she makes the point that the agreed budget on the part of the respondents provides context for the revised budget ordered by the District Judge. The revised budget remains at nearly three times the amount of the respondent's budget”.

Part 36 offers

63. A new Part 36 came into force on 5 April 2015 and contains a self-contained and detailed code about offers to settle made after that date. It contains detailed rules about the form that an offer must take in order to comply with that part and those are not considered here. The consequences of beating or not beating an offer are now:

(1) If C “fails to obtain a judgment more advantageous than a defendant’s Part 36 offer” then the court must, unless it considers it unjust to do so, award the Defendant their costs from the date that the offer could have been accepted and interest on those costs.

(2) If C obtains judgment against D that is “at least as advantageous to the claimant as the proposals contained in a claimant’s Part 36 offer” the court must, unless it considers it unjust to do so, order that the claimant is entitled to—

- (a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
 - (b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;
 - (c) interest on those costs at a rate not exceeding 10% above base rate;
- and

(d) an additional amount of 10%⁹ of the amount awarded or 10% of the costs where there is no money award subject to a maximum of £75,000.

MARTIN WESTGATE QC

22 Jun 2015

⁹ This is reduced to 5% after £500,000 and subject to the limit of £75,000.