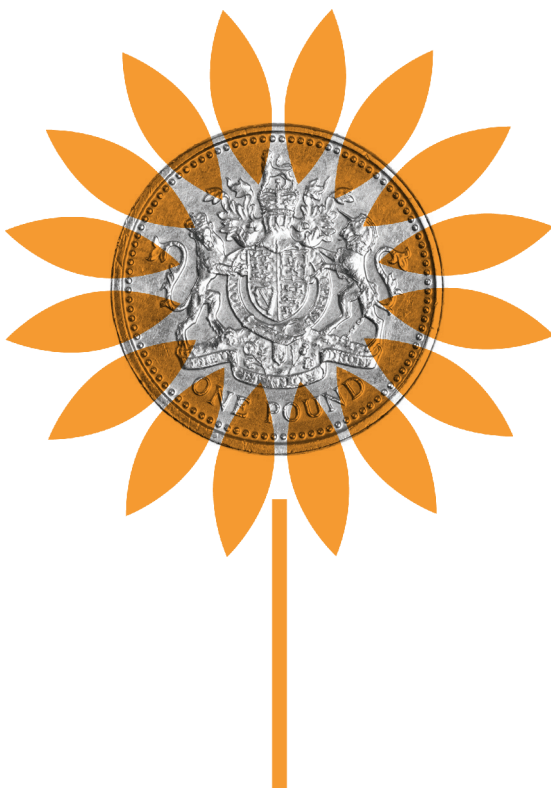


COSTS GURU

Making internal finances grow

Maximising revenue generating potential
of an in-house legal team



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Making your in-house team pay is the title of a series of training sessions the costs team are currently rolling out and, as the name suggests, is aimed at maximising the revenue generating potential of an in-house legal team. Many companies view their in-house legal function as an opportunity to drive down spend both directly, by keeping work in-house, and in-directly, by having your in-house lawyer negotiating hard with your external supplier. However, your in-house team can be revenue generating by recovering 'costs' on successful cases. With the recoverable rates likely being considerably greater than the direct cost to the business, a few successful cases in a financial year, and your in-house team begins to pay for itself.

Welcome

Welcome to the in-house edition of Costs Guru which I hope lands with you with the sun shining. In this edition James Barrett looks specifically at the potential recovery of time, either as legal costs or expert fees, by in-house legal and in-house 'experts'. With recovery in mind, Richard Antuch provides some helpful guidance to in-house legal team on the ways in which you can assist us to help you maximise your recovery.

I am in-debted to Harry Nijjar, General Counsel at KWE, who has taken the time to answer some questions about the day to day life of in-house counsel, and provide his views on relationships and funding. Dorian Morris from our CDR team adds his insight following a number of successful client secondments.

Talking of funding, I have been working very closely with Michael Clavell-Bate and Hannah Nichols in our CDR team over the past few months on funding options in litigation matters. These are exciting times and to pinch Michael's analysis, "anything goes". The multitude of options now available to both businesses and solicitors alike in relation to funding and insurance options is huge, from standard retainers to damages based agreements, collars, caps and everything in between.

As a practice we always strive to be at the forefront of innovative funding options and the next few months, as we continue to develop and refine our offering, promise to be both challenging and exciting. But more on that in due course.

In the interim, as always, if you have any funding or costs queries, or want to talk to us about the innovative ways in which we can de-risk the litigation process for you, please contact Michael or myself.

It only leaves me to wish you all a pleasant and refreshing summer break and I look forward to delivering some exciting news in the autumn.

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The National Association of Legal Fee Analysis – in the news



NALFA – The Nation's Top Attorney Fee Experts of 2018

Glenn Newberry has been listed on NALFA's 'The Nation's Top Attorney Fee Experts of 2018'. Glenn is the first dual (UK and US) qualified costs lawyer.

For full details visit the Nalfa website: <http://www.thenalfa.org/blog/the-nation-s-top-attorney-fee-experts-of-2018/>



The Nation's Top Attorney Fee Experts of 2018

**Glenn Newberry "Understands Fee and
Billing Issues Across Borders"**

Costs unit services

1 Pre-project/litigation:

- bespoke retainer and alternate fee advice
- advice on third party funding options
- advice on after the event (ATE) insurance and managing litigation risk

2 During project/litigation:

- preparation of budgets and case plans
- monitoring of spend versus budget on a “phase-by-phase” basis
- preparation of precedent H forms for case management conferences
- advice on and negotiating budgets
- attendance at costs management conferences
- advice on the costs implications of without prejudice and part 36 offers
- preparation of statements of costs for interim hearings
- advice on and preparation of statements to support schedules of costs for security for costs applications
- provide expert witness services in relation to costs recovery and procedure in the UK
- consideration of and advice in relation to draft judgments to include preparing or assisting with the preparation of costs submissions

3 Post-project/litigation, we offer a full cradle to grave costs service for both paying and receiving parties including:

- schedules of costs
- bill drafting
- points of dispute / replies
- advice on settlement and points of law
- negotiating with third parties and insurers
- part 8 costs only proceedings
- representing clients in disputes with their previous solicitor
- attendance at detailed assessment hearings

The in-house lawyer's perspective



Harry Nijjar, in-house counsel at global delivery firm, Kintetsu World Express, speaks to Costs Guru, and gives his perspective on relationships, budgets and funding.

1. As an in-house lawyer, no doubt your job and your day is quite diverse, can you give me a typical day (not that such a thing truly exists)?

It is typically taking instructions from my clients (which happens to be my colleagues) and then managing external counsel or undertaking the work myself. This could be anything from a simple query to a complex legal issue as well as being domestic or cross jurisdictional. Wherever possible or appropriate you look to carry out the work yourself where time and ability permits as you are under constant pressure to control costs. The whole point of having in-house counsel is to not only provide in-house support but to also provide an interface between the business and our lawyers.

2. Thinking of your relationships with, and the service provided by, your external suppliers what issues do you encounter which are likely to cause you the most problems internally?

I see two arms to this. The first is to ensure that costs are kept to a minimum whilst balancing the service with the issue in question (the buying aspect) and the second is to ensure that external counsel is working as effectively as possible. The relationship between internal and external counsel should be a team where both parties know their responsibilities and know how to work with each other (the efficiency aspect). Both impact how senior management perceive the service being provided.

3. How can we help you ensure these issues do not arise?

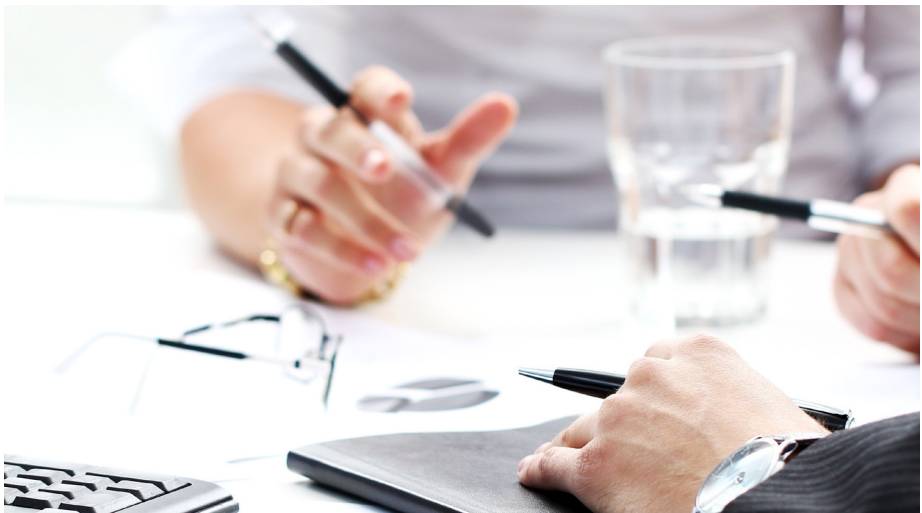
I think its important to have clarity on costs from the outset and more importantly to have that effective working relationship with the right lawyer in the right firm.

4. I know KWE have used Eversheds Sutherland on a number of their matters and you and I have worked together on a large costs claim, what is it about our offering which is so attractive to KWE?

When you work with Eversheds Sutherland they take the time to partner you with the right fee earner. You have a partner that looks after the business at large, who understands exactly that. They take the time to get to know you and your working environment. I can pick up the phone and talk to that Partner, explain the problem and be completely open about what sort of service I require and how I wish costs to be dealt with. More than often Eversheds Sutherland usually find the right solution or we discuss the matter to find something that will work. That process is repeated once the work is actually instructed and it is that ability to understand which direction the client wishes to go that is so important to us.

5. You know we are always looking at innovative ways in which to fund litigation. What types of fee agreements, risk sharing of otherwise, are particularly attractive to you and KWE? Specifically, would KWE be interested in agreements which de-risk and take litigation spend off-book in return for a share of the spoils at the conclusion?

Absolutely. I think there is a stigma over CFAs not only with clients but also with firms. The client typically thinks that a top tier firm is unlikely to offer a CFA and many a firm lack the confidence to take on some work with risk. I have seen firms walk away from work even when the odds were stacked in their favour simply because they didn't have the flexibility or the commercial foresight. We worked together on a CFA recently and I felt it was a much more positive way of working as external counsel are more incentivised and integral to the issue given the higher yet contingent reward. Its a win-win for the client.



Hand in hand – secondments in practice

During my time at Eversheds, I have been fortunate enough to have been seconded on three separate occasions to clients as diverse as retail banking through to manufacturing. They were all challenging in their own different ways with it being necessary to learn to adapt to new colleagues, different working practices and cultures. Whilst testing yourself in a new environment takes one out of your comfort zone, it allows you to fully put the skills you have learnt over the years to the test.

In my experience, the role of an in-house lawyer is very different to that of a lawyer in private practice.

In private practice there tends to be a specific focus on the particular case(s) you have been instructed on which will be in your specific practice area. Time is recorded for the work undertaken and, where appropriate, recovery of costs is sought from the other side.

In-house life can be much more varied and is focused on offering legal support and advice to the specific business areas, and being responsive to and advising various parts of the business on a varying number of issues as and when they arise. In essence, seeking to ensure

that any issues that arise are addressed and resolved at an early stage and before they become claims. Pro-active risk management, the sort of role that, for example, our health and safety team regularly advise clients on, rather than, which as a litigator I am more familiar with, resolving disputes that have arisen.

Whilst in-house, time recording and costs recovery were not a feature of this work or part of the day to day role. As you would expect, if matters were outsourced and proceedings subsequently issued, then the business areas would more often than not seek to recover those costs.



In those matters where I did undertake more traditional litigation work, there was an understanding that costs could be sought in certain circumstances from the other side and if this was desirable, you would need to put in place the necessary processes to ensure that you were able to capture and recover your time. However, this was not the norm, and I do think that in house lawyers can, provided that are afforded the time to do so recover costs for more of the work they do.

One aspect of the role of an in-house lawyer is, of course, to work with external lawyers. Having spent almost all of my career in private practice, I was very familiar with this relationship, but experienced it in reverse – an experience which I would highly recommend.

As well as an excellent service, one thing the in-house lawyer looks for is as much certainty as is possible in respect of the legal spend, as they will need to ensure that the budgets from the appropriate part of the business make sufficient allowance. To that extent, a wide and flexible fee offering from the external lawyer is very important to in house legal teams. Fixed fees, capped fees and various other variants are often welcomed, as is the ability to properly project manage a matter against agreed budgets and from my role at Eversheds Sutherland, I know that our offering and flexibility of finding the right fee structure for the client is key.



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Maximising costs recovery

The costs of in-house lawyers can be recoverable from a paying party, but how can businesses ensure they maximise the recovery of these costs?

Where there is an entitlement to recover costs, as well as the fees of external lawyers, it is also possible for a business to recover the fees of its in-house lawyers where 'legal work' has been undertaken. Paying parties are often quick, however, to challenge in-house legal costs, so how can a business help maximise its recovery?

Keep a record

Try to keep a detailed record of the work carried out to justify the time spent. Include details of the work undertaken and how long was spent. Remember, the recovery extends only to work which is 'legal' in nature, not time spent as a 'client'. For example, being interviewed to allow a statement to be prepared is not legal work, but if you interview colleagues in your business in order to prepare a statement, that is [be mindful however that legal professional privilege may not extend to interviews which are fact-finding in nature].

Be part of the budget

Where a party is required to file a Precedent H costs budget, make sure the in-house lawyer's time for 'legal work' is included in the incurred costs section of the budget. Likewise, estimated fees for the in-house lawyer should be included in the budget where further legal work is anticipated.

Match the work to expertise

As far as possible, have regard to the level or grade of solicitor undertaking the work. It may be reasonable for the GC to proof the Managing Director, but not necessarily to conduct a fact-finding interview with the janitor. Obviously, if you are the only counsel, then you will have to undertake the work but the rate which is potentially recoverable will be adjusted accordingly.

Timing of instruction of the external lawyer

Consider whether it is more cost efficient to instruct external lawyers at the outset? Where the matter requires a particular set of expertise, it is likely to be more effective from a recovery perspective to involve external lawyers sooner rather than later.

Finally, although not specifically a costs point, it is perhaps worth mentioning that it can be possible to recover costs of wasted

management time in a dispute for breach of contract where the alleged wasted management time relates to dealing with the breach. If supportive evidence can be adduced, such as demonstrating a decrease in turnover when employees have been dealing with the breach, this might prove to be another option for recovery of both in-house lawyers and other staff time. This would have to form a head of damage rather than awaiting the costs' recovery process.



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Making litigation pay – recovery of costs by your in-house legal team

Whilst the principle of recovering time spent by in-house legal teams in civil litigation is a long established one, there remains uncertainty around what in-house lawyers should seek to recover. In this article, James Barrett looks to remove this uncertainty.

The principle

The principle for recovering in-house legal costs was established as far back as 1900 in the case of *Henderson v Merthyr Tydfil Urban Council* [1900] 1 QBD 434. Where work undertaken can be characterised as 'legal work' and the time incurred has been recorded or can be estimated in support, it is, in principle, recoverable between the parties.

The principle was extended in *Ultraframe (UK) Ltd v Eurocell Building Plastics Ltd* [2006] EWHC 90069 (Costs) to provide that in-house costs could be recovered even if external lawyers were instructed. However, it should be noted that the courts will be focused on establishing whether the work carried out by the in-house legal team is 'legal work' and also whether there is any duplication of the work done by the external lawyers, more of which later. Still further, whilst the work itself does not have to be carried out by a qualified solicitor or other legal professional, work undertaken by 'paralegals' or 'legal assistants', has to be under the auspices of an in-house legal team, and under the supervision, direct or otherwise, of a solicitor.

In response to the obvious question "At what rate should I seek to recover my time?", the courts have long since held, first in the 1973

case of *Re Eastwood; Lloyds Bank v Eastwood* [1975] Ch 112, [1974] 3 All ER, and latterly in the case of *Cole v BT* [2000] All ER (D)917, that unless the paying party can point to evidence to the contrary, the rate which should be allowed for an in-house lawyer is akin to that recoverable by his/her external counterpart. Apart from the ease of calculation, the court recognised that in-house legal departments come at a cost, and were keen to avoid a situation whereby the losing party received some sort of costs windfall simply because the successful party had kept the matter in-house rather than using an external firm of solicitors.

This principle applies even in cases where the in-house lawyer may have an agreed lower internal cross charge rate within the business.

Recoverable and non-recoverable work

There are no set principles as to what in-house lawyers can recover and therefore limitations on what is recoverable will mirror those applicable to external lawyers' bills of costs. In essence if you are seeking to recover work, it must be 'legal work', that is, work which you would normally expect an external lawyer to undertake. Work that is tantamount to acting as the client or work which is administrative in nature, is not recoverable.

As with external lawyers, where an in-house lawyer seeks their costs, this will need to be both reasonable and proportionate to the matter. It should also be noted that any costs that you seek to claim must, at the time of the assessment, be capable of detailed itemisation and preferably be supported by a time record. If you are intending to recover the cost of your time from the other side, you should endeavour to keep detailed contemporaneous records of the work you are doing on the matter in question. In-house teams are encouraged to adopt similar practices to time recording as external lawyers such as using a time recording system. However, the absence of time records should not be considered a bar to recovery, the starting point is that the work has been done.

Whilst the guidance on what work is recoverable is necessarily broad, case law has helpfully provided some guidance as to excluded work, this generally includes:

- costs compensation for more general “labour and trouble” (*London Scottish Benefit Society v Chorley*)
- arranging funding for litigation (*Motto v Trafigura*) – save arguably in Arbitration matters
- “marshalling the facts” work done by the in-house lawyer (*Richards & Wallington (Plant Hire) Ltd v Monk & Co Ltd*)
- instructing an external solicitor
- not acting as ‘client’ - that is work which a client would have to do to instruct a solicitor in any event, as oppose to work which can be considered ‘legal’ work”
- Post Box - that is not simply being a conduit between the board and external counsel as such work would be considered ‘client’ rather than ‘legal’ work, and/or duplication (see below)
- duplicative activity (*Ultraframe (UK) Ltd v Eurocell Building Plastics Ltd and another*)

Experts’ fees

Another area where recovery can potentially be made, is the costs of internal staff completing specialist work required for the litigation, which could be considered ‘expert’ in nature and where they satisfy the criteria laid out in CPR 35. By way of example this could include an accountant preparing financial modelling.

Conclusion

If you are being instructed by an in-house lawyer, or you yourself are an in-house lawyer with or without external representation, it may well be possible to recover a proportion of your or your in-house lawyer’s time and regardless of any internal cross charge considerations, at a commercial hourly rate. Key to recovery is establishing that the work undertaken was ‘legal’ as oppose to ‘client’ work, and that the time spent has either been recorded, or can be sensibly estimated ex-post facto.

It is also worth noting that costs budgeting rules apply to in-house fees. If you or your client intend to seek to recover in-house lawyer or expert costs at the conclusion of the case, you must make sure such costs are recorded in the Precedent H budget form. Failure to do so could preclude recovery on assessment.

If in doubt, seek the advice of a costs specialist.

Want to know more?

The costs unit are currently running talks on this topic, amongst others. If this would be of interest to you or your team, please do get in touch.



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De-risking funding

Glenn Newberry on moves to reduce risk in commercial CFA and DBA cases

This article was first published in the April edition of *Litigation Funding* magazine and is reproduced here by the kind permission of the Law Society.

Conditional fee agreements have long lent themselves to volume litigation; personal injury claims; clinical negligence; portfolios of cases where a solicitor can spread the risk across a number of smaller value cases.

The inherent problem on a one off commercial case – either under a CFA or a fully contingent damages based agreement – is the huge financial downside of a loss, without a portfolio of success fees on other cases to compensate. The take-up of CFAs and DBAs for commercial cases has therefore been slow. But that may be about to change.

Commercial clients are becoming increasingly sophisticated and costs-conscious, and often want their legal advisers to share the risks and rewards of litigation, with ‘skin in the game’.

The default response by many law firms is to offer either a discount on their headline rate, or a reduced fee, rather than a full CFA. Under the latter, a solicitor foregoes, say, 50% of the fees, with the client paying 50% as the matter progresses. The contingent element becomes payable only in the event of a win, often with a success fee akin to the contingent amount. As such, the solicitor retains skin in the game, without the risk of losing everything.

As for DBAs, all fees are at risk and if the case is unsuccessful, the solicitor will not get paid. Further, if the case is successful but damages do not cover the solicitor’s work in progress, a solicitor will still lose money.

So, designed to allow solicitors to hedge risk on DBA and CFA matters, a specific type of ATE policy is available: own fees cover.

OWN FEES COVER

The policy is taken out by the solicitor and operates to cover a pre-agreed percentage of their unbilled fees or ‘work in progress’ (WIP) if the claim is unsuccessful. The percentage can vary, but typically covers around 75% of the WIP (although it can be up to 100%). The premium is deferred and self-insuring, so if the case is unsuccessful, the solicitor will receive the agreed percentage of its insured WIP while not having to meet the premium. If successful, the premium would be realised from the success fee or DBA fee due from the client. The level of premium will vary based on the risks of the case and level of cover, but is typically around 70% of the insured amount.

Example 1 – full CFA with ATE own fees cover

Estimated fees of £200,000

75% of estimated fees insured, £150,000

Deferred premium 70% of £150,000: £105,000

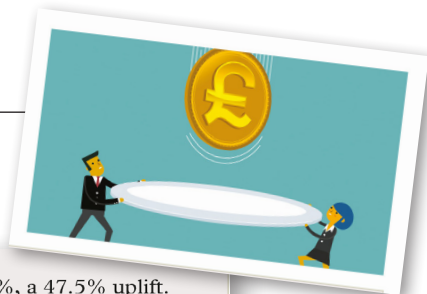
Case is successful, client pays £200,000 base costs plus a £200,000 success fee

Insurer is paid £105,000 premium

Solicitor bills £295,000 net

Case is unsuccessful, the solicitor is paid 75% of its WIP, £150,000

The ATE product works to hedge the risk. Had the above example been run under a traditional CFA, with a 100% success fee, the solicitor would have been paid either nil, or 200% of fees. Under example 1, the



amount is either 75%, a 25% reduction, or 147.5%, a 47.5% uplift.

Pricing for commercial litigation is becoming increasingly competitive and services are often purchased by a procurement team rather than in-house legal. The procurement team's job is often just to achieve the largest reduction or lowest fee possible. Many solicitors routinely offer up to a 30% reduction on headline rate to secure an instruction. Again, assuming estimated WIP of £200,000:

Example 2 – straight discounted fee agreement

Estimated fees £200,000

Discounted rate, no CFA, of say 70%

Solicitor bills £140,000, win or lose

Why not go a step further and instead of offering a 30% reduction with no upside, offer a greater, 50% reduction and accept some 'skin in the game'? The contingent 50% can then be insured. Using the same example figures as above, this is how such an arrangement might work:

Example 3 – discounted CFA with ATE own fees cover

A 50% discounted CFA with insurance for 50% of the contingent element:

Estimated fees £200,000

Client pays 50% in any event £100,000

Contingent element is £100,000

50% of the contingent element £50,000 is insured

Deferred premium of say 70% of £50,000, £35,000

Case is successful, client pays £200,000 base costs plus a £100,000 success fee

Insurer is paid the £35,000 premium out of the success fee

Solicitor bills £265,000 net

Case is unsuccessful, client has paid £100,000 base costs in any event and is paid 50% of the contingent element, £50,000

Solicitor bills £150,000

As can be seen from the figures above, by offering the client a greater upfront discount and offering to share in the risk and reward, even if the case is unsuccessful, the solicitor's net return is still higher than under a straight discounted agreement.

'Innovative solutions', 'risk and reward', 'skin in the game' are buzz phrases for clients increasingly looking to their law firms for solutions to the funding of litigation which both de-risks the process, and ensures the solicitor is invested.

Historically, for all but perhaps a few boutique firms, the downside of CFAs on commercial cases was just too great. The advent of own costs insurance cover might finally prove to be the catalyst for the greater use of CFAs in commercial cases, and indeed may provide a much needed boost to the DBA market.

Costs cases update

ATE without an anti-avoidance clause does not provide security

***Premier Motorauctions Limited (in liquidation) et al v PricewaterhouseCoopers et al* [2017] EWCA Civ 1872**

The first instance decision of this case was previously reported in our Winter 2018 edition of Costs Guru. In short, the judge refused to accept an ATE policy as security for costs in a case where security was required. This was because the policy could be voided for, for example, material non-disclosure by the claimants. This, said the court, potentially left the defendant exposed.

The Court of Appeal, in upholding the decision of the court below, accepted there was no evidence to suggest the ATE insurer would seek to avoid cover, but the lack of an anti-avoidance clause in the policy potentially left the defendant exposed.

Whilst not determinative on the issue, it is clear following the court's decision, that in order to potentially serve as security, at the very least an ATE policy will need an anti-avoidance clause.

Any term in relation to costs outside of the provisions of Part 36 renders a Part 36 offer defective

***James v James (Costs)* [2018] EWHC 242 (Ch)**

In the 2002 case of *Mitchell v James* [2002] EWCA Civ 997, the Court of Appeal held that any provision in relation to costs inconsistent with the terms of Part 36 rendered the offer not a Part 36 offer.

In the *James v James* matter, the "Part 36" offer included a costs provision inconsistent with those provided for in CPR Part 36. Part 36 includes an automatic provision in relation to costs if the offer is accepted within the specified period (usually 21 days). If accepted outside the specified period, either the parties must reach a separate agreement in relation to costs, or return to the court to determine costs. The claimant's offer in the current case included the following provision in respect of costs:

"...up to the end of the Relevant Period or, if later, the date of service of notice of acceptance of this Offer".

By including this variation regarding the incidence of costs, the High Court, following *Mitchell*, ruled that the offer could not be viewed as a valid Part 36 offer.

Influencing the timing of settlement leads to a third party costs order

***Sir Kevin Barron & Ors v Jane Collins MEP and United Kingdom Independence Party* [2018] EWHC 253 (QB)**

This was a libel case brought against a member of the United Kingdom Independence Party ("UKIP"), who, during a 2014 party conference, accused three Labour MP's of knowingly failing to intervene in cases of child abuse in Rotherham. The claim was successful and the defendant was ordered to pay £358,000 damages, plus costs. The claimants' bill of costs totalled £669,605.68.

The defendant failed to pay, so the claimants pursued a third-party costs order against UKIP. The claimants argued that UKIP financially supported the defendant and influenced her conduct in respect of settlement negotiations. UKIP argued that such an award would be unjust, as they had never sought control of the litigation.

It was held that UKIP acted in good faith by providing litigation funding to someone to whom it felt some moral responsibility. However, it was held that UKIP had influenced settlement negotiations so as to delay settlement until after the general election and, but for their influence in this regard, the claim would have likely settled earlier. Under the circumstances, UKIP were held to be jointly and severally liable with the first defendant for the claimants' costs incurred during the period where UKIP had influenced settlement. This limited costs order also included the costs of the assessment hearing.

Guidance on the recoverability of foreign lawyers' fees

***Campbell v Campbell* [2018] EWCA Civ 80**

This case involved a litigant in person appealing the first instance decision that he could not recover the costs of work undertaken by a foreign lawyer.

Before becoming a litigant in person, he instructed a law firm in London to deal with his claim, which fell under the jurisdiction of England and Wales. He later became a litigant in person and sought advice from a firm based in Jersey, who had been assisting him with another related matter in Jersey's jurisdiction. The majority of the work undertaken by the Jersey firm was by a partner who was not qualified to practise in England and Wales.

Pursuant to CPR 46.5, litigants in person are entitled to recover, inter-alia, "payments reasonably made by the litigant in person for legal services relating to the conduct of the proceedings". The first instance judge ruled that the fact the Jersey lawyer was not entitled to practice in England and Wales meant his assistance did not constitute the 'legal services' mentioned in CPR 46.5.

The Court of Appeal upheld the first instance decision. Although CPR 46.5 did not define 'legal services', under common law this was required to be provided by (or under the supervision of) a lawyer. The Jersey based partner, who lacked qualification in England and Wales, could not be regarded as a 'lawyer'. The litigant's appeal was subsequently dismissed.

Payments on account where there is an approved costs budget

***Cleveland Bridge UK Ltd v Sarens (UK) Ltd* [2018] EWHC 827 (TCC)**

The High Court was required to determine the level of a payment on account of costs in a case where the parties had filed approved costs budgets. The High Court held that the starting point was the estimated costs included in the approved budget, which should be subject to a maximum deduction of 10%. In respect of the incurred costs, the court was required to determine a reasonable sum.

As such, courts should not shy away from making what appear to be generous payments on account in cases where there is either an approved or agreed budget. Of course, the court still needs to have regard to phase. Not accepting that overall costs being less than the overall budget is good reason to make a generous award, and of course having regard to the level of incurred costs and the overall proportionality.



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