

Litigation Update

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Case management and costs	1
<i>Brookfield Construction (UK) Ltd v Mott Macdonald Ltd</i> – creative approach in the TCC.....	1
<i>Higgins v Ministry of Defence</i> – recovery of costs at London rates	2
Damages for distress and disappointment	4
<i>Milner v Carnival plc</i> – appropriate level of award.....	4
Withdrawal of Part 36 offers	5
<i>Whistance v Valgrove Ltd; Gibbon v Manchester City Council</i> – effect of rejection	5
In brief	7
Appeals	7
Costs on discontinuance	7
Guideline hourly rates	7
Solicitor and own client costs	7
Solicitors’ higher rights of audience.....	7
Statements of case and experts’ reports.....	7

Case management and costs

Brookfield Construction (UK) Ltd v Mott Macdonald Ltd – creative approach in the TCC

[2010] EWHC 659 (TCC) <http://www.bailii.org/ew/cases/EWHC/TCC/2010/659.html>

This judgment reports on various case management decisions in this action brought by the claimant (formerly Multiplex Constructions (UK) Ltd, known as MPX) to recover damages of more than £200 million in respect of engineering consultancy services provided by Mott in connection with the Wembley Stadium project which overran by more than a year. A sub-trial is due to go ahead in 2011.

Mott asked Coulson J to express his views as to the reasonableness of MPX’s costs to date. It argued that because MPX’s costs were so high (more than £28 million), indications would assist the parties in their dealings (presumed by the judge to mean settlement negotiations or ADR) and would enable them to work out whether MPX’s estimated costs going forward (a further £17 million to the end of the sub-trial) are reasonable or proportionate. There was no question of assessing costs at this stage or of applying a costs cap.

Coulson J gave the indications requested, the following of which are of particular interest:

- The £12 million spent by MPX on experts so far appeared to be unreasonable and disproportionate and had not been translated into analysis in the existing pleadings.
- The £100,000 allowed for reading into the case when Freshfields took over from Clifford Chance at the end of the pre-action protocol process was inadequate. MPX accepted that wasted or duplicated costs caused by their change of solicitors would not be recoverable and this sum would need to be increased.
- MPX's electronic document management had been farmed out to an Australian firm, Potter Farrelly and Associates, which is now in liquidation. MPX accepted that the costs thrown away as the result of the insolvency would not be recoverable against Mott but it was impossible for the judge to comment on the amount in question at this stage. He did express the potentially contentious opinion, however, that the farming out of document management is an unfortunate development which is likely to increase costs unnecessarily.
- MPX's pre-action costs of £5 million were potentially unreasonable and disproportionate. In the judge's view, such expensive protocol exercises with little obvious end product will only strengthen the hand of those keen to see the TCC pre-action protocol process scrapped altogether. Jackson LJ has recommended keeping a slimmed-down version of the TCC protocol at this stage with a further review in 2011 when the court moves to the Rolls Building to form part of the new Business Court.

Comment: this is an example of the new muscular case management we have come to expect from the TCC which is leading the way in implementing the Jackson reforms. It obviously won't be appropriate generally to make indications about the reasonableness of costs but it is an attractive option where costs are the principal obstacle to settlement. The judge also gave the parties a warning that ADR was appropriate in this case and that his perception of one side's willingness or otherwise to participate in ADR will be an important element of his deliberation on costs following the sub-trial next year.

There was one further development which may also prove popular with other judges. The parties agreed to be bound by an order that costs would only be recoverable beyond their present costs estimates if they are able to demonstrate an unforeseen increase which the court concludes is reasonable. Coulson J did this previously in *Barr v Biffa Waste (No 2)* and it is a practical way of getting round the narrow circumstances in which the court can make a costs capping order following the introduction last year of the new CPR 44.18.

Higgins v Ministry of Defence – recovery of costs at London rates

[2010] EWHC 654 (QB) <http://www.bailii.org/ew/cases/EWHC/QB/2010/654.html>

The 82 year old claimant was living in Broadstairs in Kent in 2007 when he saw a consultant who told him he had asbestosis. The consultant mentioned the name of London solicitors Field Fisher Waterhouse and the claimant instructed them to bring his claim.

The claim was settled shortly before the claimant died in 2008. The parties couldn't agree costs, one of the issues being the claimant's use of London solicitors. Master Campbell allowed the claimant to recover Central London rates and the defendant appealed on the ground that the claimant could have instructed local solicitors of equal competence.

There is a list of relevant factors set out in the White Book at para 47.14.6 taken from the judgment in *Wraith v Sheffield Forgemasters*. This list is not exhaustive – and indeed, two of the material factors in this case are not included, namely the age of the claimant and the urgency of the case – but it is a good starting point. The factors include:

- the importance of the claim to the claimant;
- the complexity of the matter;
- geographical considerations;
- recommendation;
- accessibility of the London firm to the claimant and the relevant court;
- whether the claimant enquired about the level of fees and compared them with those of local solicitors.

In the present case, the urgency of the matter and the fact that the claimant was not within easy striking distance of a city, such as Sheffield or Leeds as was the case in *Wraith*, meant that the claimant could not be criticised for instructing London solicitors with the necessary expertise.

Comment: in *Earles v Barclays Bank plc*, reported widely for its costs ruling penalising Barclays for their inadequate disclosure, HHJ Simon Brown, sitting in the Birmingham Mercantile Court, refused to allow Barclays to recover costs at a full City hourly rates. Whilst the bank was entitled to instruct Simmons & Simmons and counsel from leading commercial chambers Fountain Court, it was not entitled to recover costs at City rates from the claimant, an impecunious bank customer, who had struggled to afford to instruct a small firm from Stratford upon Avon and counsel from St Phillips Chambers in Birmingham to represent him just for the trial.

This decision indicates how hard it may be for parties to recover London rates where the claim is heard in one of the Mercantile Courts. This is particularly so given the desire of the judiciary, particularly strongly felt in the case of judges such as HHJ Simon Brown, to implement the Jackson reforms where possible and to reduce the cost of civil litigation. Whether or not a case is heard in a Mercantile Court will become increasingly important where a party wishes to recover costs from the other side at London rates.

This is illustrated by the recent decision in *CFH Total Document Management Ltd v OCE (UK) Ltd and National Australia Group Europe Ltd*. The second defendant NAGE applied to transfer the action from the Bristol Mercantile Court to the Technology and Construction Court (TCC) in London. Edwards-Stuart J, sitting in the TCC, refused the application. He held that the decision was one for the Mercantile Judge in Bristol to decide. In general, where a TCC case at a regional centre merits case management or trial by a High Court judge, it will be more appropriate for the judge to come to the relevant court than for the case to be transferred to London. Since NAGE is represented by Dundas & Wilson LLP, a firm based in Scotland and London, whereas the other parties are represented by regional firms, the costs significance of where the trial takes place, were NAGE to defeat the claim and get a costs award in its favour, is clear.

Damages for distress and disappointment

Milner v Carnival plc – appropriate level of award

[2010] EWCA Civ 389 <http://www.bailii.org/ew/cases/EWCA/Civ/2010/389.html>

Mr and Mrs Milner paid £59,000 for a 106 day maiden world cruise on the Cunard ship Queen Victoria. They specifically wanted a mid-ships cabin because they thought it would be least affected by the movement of the ship in poor weather. The opposite proved to be the case and they were kept awake by banging noises. They were offered other cabins but none proved to their satisfaction and they left the ship at Honolulu after 28 days. They were reimbursed for the cost of the remainder of the cruise.

In addition to damages for the diminution in the value of the cruise of £5,000 (reduced to £3,500 on appeal), the judge awarded them £7,500 each for their distress and disappointment. Mrs Milner was also awarded £2,000 for her wasted expenditure of £4,300 on 21 evening gowns which she had bought for the cruise. As the judge put it, “how many times in Leeds, Harrogate, Weatherby or York would she be having an opportunity to get her formal gowns on? Certainly nothing like three evenings a week which would be the case on the cruise”.

The Court of Appeal reviewed the levels of awards made in holiday cases and in the other types of case in which claimants may be awarded damages for distress. These include awards for psychiatric damage in personal injury cases, for injury to feelings in cases of sex and race discrimination and damages for bereavement where a parent has lost a child. This latter is likely to be the most acute form of distress and the present maximum figure is £10,000. In this context, the awards to the Milners of £7,500 were excessive. Mr Milner was awarded £4,000 and Mrs Milner £4,500, with no damages for the unworn gowns.

Comment: although distress is not relevant to all litigation, recent difficulties with travel caused by the British Airways strikes and the eruption of Eyjafjallajokull have made this decision too topical to ignore. It is also the case that claims for damages for distress, and not just physical discomfort and inconvenience, may now be thrown in for good measure in many different types of claim and litigators need to know when they are valid and the levels of appropriate damages. There is no general legal liability for damages for inconvenience and distress so these claims need to be approached with circumspection.

The House of Lords decision in *Farley v Skinner* comes to mind given the recent quiet skies Mr Farley specifically asked the defendant surveyor, Mr Skinner, to report on whether the house he wished to buy 15 miles from Gatwick was affected by aircraft noise. Mr Skinner it incorrectly reported that it was unlikely that the property would suffer greatly from aircraft noise. The House of Lords awarded Mr Farley damages of £10,000 (at 2001 rates) for discomfort caused by the noise on the ground that, by analogy with the holiday cases, it was a major or important object of the contract to give pleasure, relaxation or peace of mind. It did not have to be the “very object” of the contract as had been held previously in *Watts v Morrow*. However, had Mr Farley not specifically asked Mr Skinner to investigate the matter for his peace of mind, he would not have been entitled to damages under this head.

The House of Lords had looked at a related problem in 1996 where an individual failed to get precisely what he contracted for. In *Ruxley Electronics and Construction v Forsyth* Mr Forsyth contracted for a swimming pool which he specified should be 7 foot 6 inches deep but which turned out to be only 6 foot 9 inches deep. The cost of removing the pool and rebuilding it was £21,000 and the difference in value between the pool as constructed and a pool of the correct depth was nominal. The House of Lords awarded him damages of £2,500 for loss of amenity, representing the subjective value to Mr Forsyth over and above the commercial value.

Although the courts apply a strict approach to claims for damages for distress and inconvenience, a more relaxed attitude is taken, for example, by the Financial Ombudsman Service. The FOS notes that, whilst the courts usually award compensation for distress or inconvenience only where the object of the contract is to provide pleasure, relaxation or peace of mind, the FOS will award it more widely since it usually considers it fair that a financial business which has caused material distress or inconvenience or other non-financial loss should be required to pay compensation. Examples of levels of awards are given in the guidance note at http://www.financialombudsman.org.uk/publications/technical_notes/distress-and-inconvenience.htm#2.

Withdrawal of Part 36 offers

Whistance v Valgrove Ltd; Gibbon v Manchester City Council – effect of rejection

HHJ Holman Manchester County Court September 2009

Since CPR 36 was amended in 2007, confusion about the applicability of the rules of offer and acceptance to Part 36 offers (as against other without prejudice save as to costs Calderbank offers) has abounded. The absence of any guidance in the CPR as to the effect of subsequent offers upon Part 36 offers which have not been expressly withdrawn has not helped matters. The county court decision in *Gibbon* is being appealed to the Court of Appeal so there is hope for clear guidance in the near future. In the meantime, given the importance of these issues, these conjoined cases are a good opportunity to remind ourselves of the rules as they stand at present.

Whistance

The claimant made a pre-action Part 36 offer of £3000 which was rejected by Valgrove. Once proceedings had been issued, the claimant made an increased Part 36 offer of £7,900, without expressly withdrawing or even referring to the first offer. The defendant purported to accept the first, lower Part 36 offer made by the claimant. There is nothing in CPR 36 dealing with this situation.

On appeal from the district judge, HHJ Holman held that the claimant was not bound by the original Part 36 offer, even though it was not formally withdrawn, because common sense dictated that the second Part 36 offer necessarily replaced the previous offer which was therefore impliedly withdrawn. In general, however, a party making a second Part 36 offer should make clear that its previous offer was withdrawn or amended

Gibbon

In November 2008 the claimant made a Part 36 offer in November 2008. This offer was rejected by the defendant which put forward a series of lower offers. These were rejected by the claimant who invited offers at an increased level. In February 2009 the defendant purported to accept the claimant's November 2008 offer.

HHJ Holman held that CPR 36.9(2) makes it clear that a Part 36 offer may be accepted at any time (whether or not the offeree has subsequently made a different offer) unless the offeror serves notice of withdrawal on the offeree. CPR 36.3(7) requires the offeror to serve written notice of withdrawal of the offer on the offeree even if the offeree has made a counter-offer. The onus is firmly on the offeror to take the offer out of play. The defendant was entitled to accept the November 2008 offer.

Points to remember about Part 36 offers

- A Part 36 offer must comply with the formal requirements in CPR 36.2.
- Part 36 documents (offers, notices of withdrawal, acceptances etc) do not take effect until they are deemed to be served.
- A Part 36 offer must remain open for a period of not less than 21 days.
- A Part 36 offer remains open for acceptance after expiry of the relevant period and is not extinguished by a further offer or a counter-offer.
- Before expiry of the specified period, a Part 36 offer may only be withdrawn or made less advantageous to the offeree if the court gives permission (CPR 36.3).
- The automatic costs consequences in CPR 36.10 apply if the offer is accepted eg the defendant will be liable for the claimant's costs if the offer is accepted within the relevant period.
- A Part 36 offer can be accepted at any time unless it is expressly withdrawn in writing or impliedly withdrawn by the making of a subsequent offer (*Whistance*). For a recent example where an offer was accepted 6 months after it was made, see *In the matter of Kilopress Ltd*.
- The fact that the other party has rejected the offer does not prevent them from accepting it at a later date (*Gibbon and Sampla v Rushmoor Borough Council*).
- Although automatic costs consequences do not apply to withdrawn Part 36 offers, they may be taken into account by the court when exercising its discretion as to costs (*Pankhurst v White*).
- Parties and their insurers should review Part 36 offers that have not already been withdrawn whenever there is a new development in the case.

Points to remember about Calderbank offers

- An offer can, broadly speaking, be in any form and can deal with costs etc as the offeror wishes (eg a drop hands offer).
- It does not offer the considerable benefit of the automatic costs consequences in CPR 36.10 but must still be taken into account by the court when making a costs order under CPR 44.3.
- An offer will cease to be available for acceptance if the other party makes a counter-offer or if the offeror makes a revised offer.

- An attempt to accept an offer on new terms may be a rejection accompanied by a counter-offer.
- An offer which does not state an expiry date will lapse after a reasonable time (*Pitchmastic v Birse*, followed in *Wakefield v Ford*).
- An offer with an expiry date cannot be accepted after that date.

In brief

Appeals

The Court of Appeal ordered that outstanding costs orders, on different matters from that on which permission to appeal had been granted, should be paid as a condition of proceeding with an appeal (*Standard Bank Plc & Another v Agrinvest International Inc*).

Costs on discontinuance

The court reviewed the costs rules applying to discontinued cases in 7 cases concerning s78 of the Consumer Credit Act 1974. The claimants failed to persuade the court to reverse the usual rule under CPR 38.6 that they should pay the defendant's costs (*Teasdale v HSBC Bank plc*).

Guideline hourly rates

New guideline hourly rates for summary assessment apply from 1 April 2010. These have increased by 1.7% in line with inflation. We are waiting for the Advisory Committee on Civil Costs to complete its analysis of the issues raised in its 2009 paper *The Derivation of New Guideline Hourly Rates* (http://www.judiciary.gov.uk/docs/pub_media/guideline-hourly-rates-2010.pdf).

Solicitor and own client costs

The court was entitled to limit the costs recoverable by a firm of solicitors from its client where the firm had failed to give an estimate of costs at any stage in the litigation or to keep the client updated as to the costs incurred and had failed to make adequate attendance notes. It was not up to the client to request the information – it was up to Eversheds to provide it (*Eversheds LLP v Cuddy* <http://www.bailii.org/ew/cases/EWHC/Costs/2009/90154.html>).

Solicitors' higher rights of audience

The Ministry of Justice has approved the Solicitors Regulation Authority's new system for solicitors to gain the higher courts qualification with effect from 1 April 2010. The decision marks the closure of the accreditation and exemption routes under Higher Courts Qualification Regulations 2000 (<http://www.sra.org.uk/sra/regulatory-framework/solicitors-higher-rights-of-audience-regulations-2010.page>).

Statements of case and experts' reports

It is not appropriate for a pleading to be advanced solely by reference to an expert's report, which may or may not be provided in the future. Any claim for loss of profit, particularly a large one, needs to be properly set out in pleading form so that it can be understood and answered by the defendants. Ordinarily the statement of case should precede the expert's report (*D Morgan plc v Mace & Jones* <http://www.bailii.org/ew/cases/EWHC/TCC/2010/697.html>). For

another case on this topic, see *Upton McGoughan Ltd v Bellway Homes Ltd* (<http://www.bailii.org/ew/cases/EWHC/TCC/2009/1449.html>).

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