

# COSTS

Your Definitive Inter Partes and Legal Aid Costs Supplement

‘Litigating in  
the Shadow of  
the **Jackson**  
Reforms’

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# FOREWORD

## FROM THE EDITOR-IN-CHIEF

Hello! Welcome to this first issue of **COSTS**: a quarterly periodical designed and published exclusively by The John M Hayes Partnership.

**COSTS** was conceived with the intention of supporting litigators by consolidating significant developments in the law on *inter partes* and publicly funded costs into a single, complimentary and readily accessible e-Magazine. Every three months **COSTS** will provide you, the fee earner, with a comprehensive report of key judicial determinations, legislative changes and proposed reforms – all with a view to analysing their impact upon your legal practice. To that end, I am grateful to those of my colleagues who have contributed articles to this inaugural issue of **COSTS**.

I think it only befitting that John Hayes, Chairman, take the page to offer his thoughts on what has been a remarkable 33 years in the legal costs industry. Suffice it, then, for me to say that I hope you find this new supplement precisely what it purports to be: your definitive *inter partes* and legal aid costs review. As ever, The John M Hayes Partnership exists to assist fee earners maximise recovery of their legal costs and we hope that the content presented herein goes a long way to achieving just that.

With every good wish,  
**Christopher McClure**

## FROM THE CHAIRMAN

Over the past decade large numbers of solicitors – and especially legal aid practitioners and personal injury lawyers – have seen their work disrupted as successive governments have been determined to reduce legal costs, resulting in a dramatic fall in earnings. Costs drafting firms have not been immune and many have fallen by the wayside in direct consequence of these reforms. But after 33 years, The John M Hayes Partnership has not merely survived: it has remained, and will continue to remain, a leading force in the industry.

This company has always attracted people who were proud to work for a business which strove for competence, integrity and good service. My personal

philosophy is that business is about more than just making money and I firmly believe that this is the one of the reasons our company continues to remain viable. We have faced and overcome challenges by adapting to changes in the market in order to remain a profitable and progressive concern.

It is my wish that our clients understand that The John M Hayes Partnership is here to stay. Our strong team of law costs draftsmen and costs lawyers, together with their support staff, now cover the whole of England and Wales in key locations. And to our clients who have continued to have faith in us, we say “thank you.” Your continued instructions are so much appreciated and we look forward to enjoying a working partnership with you for many years to come.

Kind regards,  
**John Hayes**

## FROM THE CHIEF EXECUTIVE OFFICER

One thing upon which we can all agree is that a period of unprecedented change has swept through the legal profession – particularly in relation to legal costs. **COSTS** is therefore a timely and relevant publication which has been written to support litigators in their efforts to keep abreast of developments through in-depth features and articles covering *inter partes* and publicly funded costs.

Special thanks go to Christopher McClure, Editor-in-Chief, for developing the initial concept of an e-Magazine, and to all those who have collaborated on this first edition of **COSTS**. I hope that you enjoy reading the first instalment of what I am sure will be a successful and valuable resource for all those interested in keeping up to date with key developments in the world of legal costs.

And finally, the reader will note the *inter partes* and legal aid vouchers found on pages 16 and 27 respectively. These vouchers offer those who have not previously instructed The John M Hayes Partnership the opportunity to trial our services at a generously discounted rate. You can redeem your voucher by emailing [magazine@johnmhayes.co.uk](mailto:magazine@johnmhayes.co.uk).

Kind regards,  
**Kate Oliver**

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## Litigating in the Shadow of the Jackson Reforms: A comprehensive review of the 2013 reforms and their impact from a fee earner's perspective

*Christopher McClure outlines the impetus for and the reasons behind a new series of seminars presented by The John M Hayes Partnership for 2018.*

The year 2013 witnessed an unprecedented number of changes to the rules governing the recovery of legal costs. Costs budgets and costs management became a mandatory requirement in most cases allocated to the multi-track; the introduction of a new Protocol for employers' liability and public liability claims – together with an increase to the limit of the RTA Protocol to £25,000 – extended the application of fixed costs to virtually all fast track personal injury matters; and a new test of proportionality was implemented which, more than five years on, neither judge nor lawyer can confidently apply.

Costs of assessment were capped at £1,500 (plus VAT and the applicable court fee) under the rules relating to provisional assessment; electronic billing finally found its way into the Civil Procedure Rules (net of J-Codes); and, save for a very small number of exceptions, we have witnessed the almost blanket abolition of recovery of additional liabilities in the form of success fees and after-the-event insurance premiums – in exchange for which CPR Part 44 and the Practice Direction thereto were modified to provide most unsuccessful claimants with costs protection in the form of qualified one-way costs shifting (“QOCS”).

But whilst the primary intention underpinning the Jackson reforms was undoubtedly to save costs, the multitude of uncertainties arising from ambiguities within the rules have, paradoxically, served to engender an almost exponential increase in costs-related satellite litigation. And as ever, it is the solicitor, the client or both who bear the cost of ambiguous legal reform.

More so now than ever practitioners cannot afford to be ignorant of the rules of recovery – the consequences are simply too costly: failure to budget properly could see your client's recovery slashed on assessment; settling an ex-Protocol matter prior to allocation could mean a significant reduction in costs otherwise properly recoverable; and knowing (or not knowing) when and how to make an application for a payment on account of costs could do wonders (or not) for your cash flow.

And this is where we step in.

Our new series of seminars will offer fee earners a pragmatic insight to the world of costs recovery by conducting a comprehensive review of the 2013 reforms and the evolving raft of case law dealing with the conflicts and uncertainties arising therefrom. We strongly believe that fee earners who possess a sound working knowledge of the rules of recovery will maximise recovery as they learn to litigate with costs in mind.

Our seminars will cover recent decisions in relation to fixed recoverable costs, the various Protocols, Part 36 Offers, the assignment of CFAs and ATE “top-up” premiums, costs budgeting, proportionality, the scope of QOCS, electronic billing and the costs assessment process.

At a time when the legal landscape continues to undergo seismic changes it is imperative that you have full confidence in those instructed to recover your legal costs. Established in 1985, The John M Hayes Partnership has grown into one of the largest firms of law costs draftsmen and costs lawyers in the UK. We now operate nine offices throughout England and Wales and, in spite of the Jackson reforms, continue to thrive due to our reputation for excellence and commitment to maximising recovery of our clients' legal costs.

***To book your free place on our seminar please contact Nicola Hanna on 0121 643 0001 or seminars@johnmhayes.co.uk. A list of venues, dates and times can be found on the flyer immediately following.***

**Inter Partes Costs Review 2018:  
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*“A comprehensive review of the 2013  
reforms and their impact from a fee  
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Since 1985 **The John M Hayes Partnership** has been working in tandem with solicitors to maximise costs recovery. Join us in 2018 as we consider the impact of the Jackson reforms and how the courts have handled the multitude of uncertainties arising therefrom.

Our seminars are free to attend and will offer fee earners a pragmatic insight into the assessment process so that, crucially now more than ever, litigators can litigate with costs in mind.

*“Christopher McClure and his team of costs draftsmen at Manchester provide a first class service to my firm. They deal with matters efficiently and commercially to ensure my firm maximises costs.”*

*“Chris is clearly an expert in his field and has made a dry subject interesting. Useful, ‘hands on’ and practical.”*

**BIRMINGHAM 20 September 2018**

Birmingham Repertory Theatre, Birmingham Central Library, Room 102, Centenary Square, Broad Street, Birmingham, B1 2EP

**Registration: 09:30 and Seminar: 10:00 to 12:00**

**LONDON 3 October 2018**

St. Ethelburga’s Centre for Reconciliation and Peace, 78 Bishopsgate, London, EC2N 4AG

**Registration: 10:30 and Seminar: 11:00 to 13:00**

**BRISTOL 10 October 2018**

Old Square Chambers, 9 Queen Square, Bristol, BS1 4JE

**Registration: 13:30 and Seminar: 14:00 to 16:00**

**CARDIFF 11 October 2018**

Park Inn by Radisson, Cardiff City Centre, Mary Ann Street, Cardiff, CF10 2JH

**Registration: 09:30 and Seminar: 10:00 to 12:00**

**LEEDS 6 November**

Cloth Hall Court, Corduroy Room, Quebec Street, Leeds, LS1 2HA

**Registration: 13:30 and Seminar: 14:00 to 16:00**

**NEWCASTLE 15 November 2018**

Jurys Inn, Scotswood Road, Newcastle-upon-Tyne, NE1 4AD

**Registration: 13:30 and Seminar: 14:00 to 16:00**

Our seminars are provided free of charge but places are limited so please book early in order to avoid disappointment. Refreshments will be provided.

## Fixed Recoverable Costs and Late Acceptance of Part 36 Offers: The Court of Appeal have handed down judgment in what is a disappointing decision for claimant solicitors

*Christopher McClure* considers the implications of the decision in *Hislop v Perde* [2018] EWCA Civ 1726 as it relates to recovery in claims subject to the fixed recoverable costs regime found at CPR Part 45, Section IIIA.

It is probably fair to say that claimants have enjoyed a decent run in the Court of Appeal insofar as decisions relating to fixed costs are concerned.

In *Acorn v Bird* [2016] EWCA Civ 1096 it was determined that, where an ex-EL/PL Protocol claim, issued but not allocated, is listed for disposal following judgment but then settles prior to the disposal hearing, the higher fixed fee in column 3 to Table 6D (row B) of CPR Part 45, Section IIIA applies.

The Appellant Court in *Iqbal v Leek* [2017] EWCA Civ 355 faced the question of whether Stage 1 costs paid under the old RTA Protocol could be recouped in the event that the matter did not proceed to Stage 2. In allowing the claimant's appeal the Court determined that paid Stage 1 costs of £400 plus VAT were not to be treated as an interim payment on account by reference to old CPR r. 45.40 (current CPR r. 45.28) but rather a payment in respect of work actually undertaken pursuant to Stage 1 of the old RTA PAP. They were thus non-refundable.

Briggs LJ in his judgment in *Qader v Esure* EWCA Civ 1109 essentially re-wrote parts of CPR Part 45, Section IIIA to provide that any ex-Protocol matter, otherwise subject to the fixed recoverable costs regime, escapes that regime simply by reason of being allocated to the multi-track. The Civil Procedure Rules Committee has since amended CPR Part 45, Section IIIA to reflect the decision of the Court in *Qader*.

The decision in *Broadhurst and Taylor v Tan and Smith* [2016] EWCA Civ 94 represented another significant victory for claimants. There the Court held that where a claimant in an ex-new RTA Protocol matter equals or betters its own Part 36 Offer at trial, the defendant is liable for hourly rate – as opposed to fixed – costs to be assessed on the indemnity basis from the date of expiry of the Part 36 Offer onwards. It was accepted by Dyson LJ that this would “lead to a generous outcome for the claimant [but that such was] consistent with [CPR r. 36.17] as a whole.”

But whereas the question in *Broadhurst* dealt with the position when a claimant equals or betters its own Part 36 Offer on judgment, the Court in *Hislop* was concerned with the situation where a defendant accepts a claimant's Part 36 outside the relevant period. To state the issue in *Hislop* another way: in a case of late acceptance, for the period spanning the first day after the relevant period to the date of acceptance, is a claimant subject to fixed recoverable costs or entitled to recover at hourly rates?

In allowing the defendant's appeal in *Hislop*, and having conducted a fairly thorough examination of the authorities discussing the relationship between late acceptance, fixed costs and indemnity costs, the Court found that CPR r. 36.20 (the fixed costs provision) neither preserved nor modified r. 36.13 (the assessed costs provision) and, as such, “the correct interpretation of the rules is to say that, in a fixed costs case, r. 36.20 applies where an offer is accepted late, and that r.36.13 does not apply at all.”

On the basis that CPR r. 36.13 was not engaged by r. 36.20, it was determined that neither indemnity nor standard basis costs could apply and, as such, the claimant could not look to rely upon a basis of assessment (whether standard or indemnity) as a means of escaping the fixed recoverable costs regime. Said Coulson LJ:

*“These rules demonstrate that, in the mirror image of the situation in which these claimants find themselves (namely, where a claimant has*

accepted a defendant's offer late) there is no question of either indemnity or standard basis costs being awarded to the defendant. The defendant's recovery for the period of delay is limited to fixed costs only. There could be no reason to treat the claimant in a radically different way and to go outside the fixed costs regime, and order standard or even indemnity costs, in circumstances where a defendant in a similar position to these claimants is not permitted to recover costs on that basis. In this way, my interpretation of the rules applies the same fixed costs regime to any party whose offer has not been accepted when it should have been."

But perhaps the greater concern for claimant solicitors is the decision in *Hislop* concerning the relationship between late acceptance and CPR r. 45.29J: the 'exceptional circumstances' provision.



#### How late is late enough to engage CPR r. 45.29J?

CPR r. 45.29J provides claimants with one of very few escape routes from fixed recoverable costs; other avenues of escape include allocation to the multi-track (*Qader* refers) and equalling or bettering one's own Part 36 Offer at trial (*Broadhurst* refers) and are dealt with in our article *Fixed Costs in High Value Claims*.

Whilst Coulson LJ was "anxious not to express detailed conclusions about the scope and extent of r. 45.29J [because he did] not consider that its general ambit [was] directly necessary to this appeal" (the argument was not argued before the Court in *Hislop*), he did have the following to say:

"I do not consider that a defendant's late acceptance of a claimant's Part 36 offer can always be regarded as an 'exceptional circumstance'. On the contrary, I take the view that my reasoning in *Fitzpatrick* as to why there can be no presumption in favour of indemnity costs in these circumstances [...] is also applicable, at least in general terms, to the suggestion that there is a presumption that a late acceptance of a Part 36 offer is an exceptional circumstance for the purposes of r. 45.29J."

Although Coulson LJ continued by saying that "a long delay with no explanation may well be sufficient to trigger r. 45.29J; a short delay with a reasonable explanation will not" – he offered no definitive guidance on what, in the context of unjustified delay, amounts to 'exceptional circumstances' for the purposes of CPR r. 45.29J. This was a particularly unhelpful omission given Coulson LJ's comment that "it remains the position that, in an exceptional case of delay, it may be possible for the claimant to escape the fixed costs regime [under] r. 45.29J."

By deduction, then, a claim based on exceptional circumstances "may" succeed in an exceptional case of delay. Circular indeed.

Regrettably, there is no authoritative guidance on the definition of 'exceptional circumstances' which, perhaps, is somewhat surprising given its longstanding use in the predictive costs regime delineated at CPR Part 45, Section II.

Whilst the issue of late acceptance in the context of CPR r. 36.20 has now been closed, it is highly likely that another argument will open concerning what, in the context of late acceptance, constitutes exceptional circumstances for the purposes of CPR r. 45.29J.

***Please contact Christopher McClure to discuss any query relating to this article. Christopher is based at our Manchester office and can be contacted on 0161 835 4087.***

## A “Genuine” Part 36 Offer: Whether or not a Part 36 Offer was a “genuine attempt to settle the proceedings” is a factor the court must now take into account when deciding whether to depart from costs consequences following judgment

**Lee Coulthard** examines the decision of the High Court in *Jockey Club Racecourse Limited v Willmott Dixon Construction Limited* [2016] EWHC 167 (TCC) as it relates to the interpretation of CPR r. 36.17(5)(e).

The claimant had engaged the defendant to design and construct a covered grandstand at Epsom Race Course. The roof was damaged in winds which were high, but not unexpectedly so, leading to the claimant being put to the costs of repair.

During the course of the proceedings, the claimant made an offer to settle liability on the basis that the defendant would “accept liability to pay 95% of [the claimant’s] claim for damages to be assessed.” Liability was subsequently accepted by the defendant in full.

The claimant sought the costs of establishing liability on the indemnity basis. The defendant sought to resist this on the basis that the offer was not a genuine attempt to settle the proceedings. The argument was that liability was always going to be all or nothing, and that as a 95:5 decision on liability was not even open to the court, it could not be said to be a genuine offer to settle.

The court referred to *Huck v Robson* [2003] 1 WLR 1340, an RTA claim in which two cars had been involved in a head-on collision. The claimant had claimed that the defendant was entirely at fault, and had made a 95:5 Part 36 offer; the defendant had averred that the parties were equally at fault and had sought a 50:50 liability split. The claimant succeeded in full at trial. The judge had considered the 95:5 offer in *Huck* to be derisory, not least because it was an outcome that was theoretically

permissible but practically unlikely as the only realistic outcomes on liability were 100:0 or 50:50. That decision had been overturned on appeal. In *Huck*, the Court of Appeal had stated that:

*“[A] claimant with a strong case will often be prepared to accept a discount from the full value of the claim to reflect the uncertainties of litigation. Such offers are not usually based on the likely apportionment of liability but merely reflect the reality that most claimants prefer certainty to the ordeal of a trial and uncertainty about its outcome. If such a discount is offered and rejected there is nothing unjust in allowing the claimant to receive the incentives to which he or she is entitled under the Rules.*”

*“[I]f it was self-evident that the offer made was merely a tactical step designed to secure the benefit of the incentives provided by the rule (e.g. an offer to settle for 99.9% of the full value of the claim) [t]he judge would have a discretion to refuse indemnity costs.”*

In *Jockey Club* it was held that the same reasoning could apply, notwithstanding the outcome not being one available to any trial judge.

The defendant sought to distinguish *Huck* on the basis of the new CPR r. 36.17(5)(e). The argument was rejected because the Court of Appeal’s guidance on mere tactical offers in *Huck* was directed at the same mischief as r. 36.17(5)(e).



A Part 36 Offer which does not reflect a likely outcome at trial is not inherently disingenuous

However, indemnity costs were not awarded from 21 days after the offers were made, owing to deficiencies in the claimant's pleading.

(NB: Technically CPR r. 36.17(5)(e) should not have been in issue in this case at all, because the transitional provisions of the relevant Statutory Instrument provide that it only applies to offers made after 6 April 2015, but that is a point which appears to have been overlooked by both parties and the Court).

This ruling is unsurprising: at the time that the offer was made, the claim was pleaded at £400,000. The claimant was effectively offering to give up £20,000, which can hardly be said not to be a genuine attempt to settle.

The defendant's stance would, if successful, have introduced greater uncertainty into litigation by making it harder to predict whether Part 36 offers would be accepted as genuine and inevitably lead to satellite litigation.

Worse still, it would mean that parties with strong cases would have no means of pressuring their opponents into dropping weak cases without giving up excessive amounts of the damages to which they would otherwise be entitled. Such an outcome would not be conducive to early settlement of claims – therefore placing even more strain on an already overburdened court system.

CPR r. 36.17(5)(e) is designed to prevent cynical attempts to obtain the benefits of a Part 36 offer where the offeror demands close to total capitulation. If anything, here it was the offeree who was cynically trying to escape the consequences of their own failure to accept an offer which would have been beneficial to both parties.

***Please contact Lee Coulthard to discuss any query relating to this article. Lee is based at our Leeds office and can be contacted on 01943 601 350.***

## Qualified One-way Costs Shifting and Multiple Defendants: CPR r. 44.14(1) is far broader in its application than it first appeared and both sides have cause for concern

*Christopher McClure* explores a very interesting development in the applicability of QOCS following the decision of the Court of Appeal in *Cartwright v Venduct Engineering Limited* [2018] EWCA Civ 1654.

Introduced *quid pro quo* for the *inter partes* recovery of additional liabilities, QOCS applies to all personal injury cases commenced on or after 1 April 2013 where the claimant has not entered into a pre-commencement funding arrangement for the purposes of CPR r. 48.2.

QOCS aims to provide claimants with costs protection in the event that their claim is defeated. It does this by providing that successful defendants may enforce orders for costs 'only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant' (CPR 44.14(1) refers). If the claimant has, in monetary terms, recovered nothing by way of damages and interest, then it follows that the greatest amount to which a successful defendant may enforce its award for costs is zero.

There are, of course, a number of exceptions to the general rule which prevent an unsuccessful claimant from availing itself of QOCS protection. These are found in CPR rr. 44.15 and 44.16 and apply disjunctively, as follows:

- in the event of strike out on the following grounds: (i) the claimant has disclosed no reasonable grounds for bringing the proceedings; (ii) the proceedings are an abuse of process; and/or (iii) conduct which is likely to obstruct the just disposal of the proceedings;

- fundamental dishonesty on part of the claimant; or
- where the claimant fails to beats the defendant's Part 36 Offer

The case of *Cartwright* represents a very interesting development in the interpretation of CPR r. 44.14(1). The question for the Court of Appeal in *Cartwright* was this: where, in a matter to which QOCS applies, a claimant has brought an action against multiple defendants – is a successful defendant entitled to enforce a costs award in its favour against damages recovered by the claimant from an unsuccessful defendant?

The answer is yes.

Coulson LJ said the following:

*“In my view, a result which requires a claimant, in the appropriate case, to pay to a successful defendant the amount of a costs order made in favour of that defendant, out of sums payable by way of damages and interest to the claimant by an unsuccessful defendant, is precisely in accordance with what Sir Rupert [Jackson] calls “the necessary elements of a one-way costs shifting regime”. It is important that claimants are discouraged from bringing proceedings which are unlikely to succeed. Claimants with QOWCS protection should not think that this general principle does not apply to them, or that they can issue proceedings against any number of defendants with impunity.”*

The immediate and obvious concern for claimant solicitors is that it will, in certain types of claim (usually those involving a historic act of negligence), seem necessary to adopt something of a scattergun approach to issuing against multiple defendants – one or many of whom may ultimately be found, or not be found, liable. In that case, the claimant's damages otherwise recoverable from the unsuccessful defendant(s) may be eroded or even extinguished by adverse costs orders against which a successful defendant may then enforce its award for costs. This was highlighted by the following example given by Coulson LJ in *Cartwright*:

*“Let us assume that the claimant issued proceedings against two defendants, A and B, which went all the way to trial. The claimant recovered £100,000 against defendant A, but the claim against defendant B failed, leading B to incur £40,000 by way of costs. In circumstances where the claimant had freely sued B (so that a Bullock or Sanderson order was inappropriate), I can see no reason in principle why B should not recover the £40,000 from the £100,000 payable by A to the claimant.”*

In response to concerns harboured by claimant solicitors arising as a result of having issued – or the need to issue – against multiple defendants, the Appellate Court implored practitioners to “consider carefully which [defendants] may be liable and why” but then went onto say:

*“I understand too that, because it is a divisible injury, there may be times when a claimant may have to issue proceedings against a number of such employers, even if it is known that the claim against employer A is likely to be stronger than the claim against employer B. But none of that can override the need to ensure that defendants [are] not faced with a hopeless claim, in respect of which they have to incur costs, only for that claim to be discontinued shortly before trial.”*



**Claimant solicitors must do all they can in order to minimise the risk of pursuing non-liable defendants**

Solicitors who act for claimants in cases where QOCS applies must now be as certain as they can be that they are not only pursuing the correct defendant – but that they are not pursuing an

incorrect defendant. In certain cases this will obviously lead to a marked increase in the time spent by solicitors pre-issue which, frustratingly, is time not reflected by costs recovery in subject to fixed costs.

Where, however, such a claim is subject to an hourly rate assessment (whether by reason of allocation to the multi-track, beating one's on Part 36 Offer at trial, exceptional circumstances pursuant to CPR r. 45.29J or otherwise), it is likely that a court will be more generous in its assessment of a claimant's pre-action costs – at least insofar as they relate to any groundwork ascertaining the correct defendants to the claim in question. This is certainly a point worth remembering when preparing budgets for presentation at a costs and case management conference.

It is, however, important to note that the successful defendant in *Cartwright* was actually unsuccessful in enforcing its award for costs against the claimant on the basis of an interesting technicality. Having determined that the successful defendant could, in principle, enforce its award for costs against the damages payable to the claimant by the unsuccessful defendant, the Court of Appeal went on to find that the successful defendant was unable to thus enforce for reason that the damages payable to the claimant by the unsuccessful defendant were provided for by way of a Tomlin Order rather than a direct order of the court for damages or interest.

The case put forward by the claimant was straightforward: QOCS allows a defendant to enforce its award for costs only to the extent, in monetary terms, of any “orders for damages and interest made in favour of the claimant.”

The word “orders” is crucial.

Having conducted an analysis of the authorities relating to the status of a Tomlin Order, Coulson LJ concluded that “a Tomlin Order is not an ‘order for interest and damages’ made in favour of the claimant” for the purposes of CPR r. 44.14(1). Because the claimant's damages were provided

for within the schedule to the Tomlin Order, and the schedule is not an order of the Court, there was no actual ‘order’ for damages in favour of the claimant against which the successful defendant could enforce its award for costs.



**Knowing how to settle a claim involving a successful defendant is arguably of no less importance to the claimant than the settlement sum itself**

On the premise, then, that a successful defendant requires a legal instrument in the form of a court order to enforce an award for costs against damages paid by an unsuccessful defendant in a claim governed by QOCS, claimant solicitors who litigate claims involving multiple – and sometime speculative – defendants would be well advised to:

- ensure that they are pursuing the correct defendant(s) and only the correct defendant(s); and
- in the case of multiple defendants (where one or more of whom are unlikely to be found liable) settle wherever reasonably possible with any liable defendants by way of Part 36 Offer or Tomlin Order

Following the decision in *Cartwright* it would be prudent for practitioners to conduct a review of current caseloads and consider whether any matters stand at risk of adverse recovery and then act accordingly.

***Please contact Christopher McClure to discuss any query relating to this article. Christopher is based at our Manchester office and can be contacted on 0161 835 4087.***

## Fixed Costs in High Value Claims: In the effort to maximise costs recovery there are few things more beneficial than escaping the CPR Part 45, Section IIIA fixed recoverable costs regime

*David Disney considers the few mechanisms available to claimants for escaping the fixed recoverable costs regime in order to recover hourly rate costs.*

### In what circumstances do fixed recoverable costs under CPR Part 45, Section IIIA apply to high value claims?

Pursuant to CPR r. 45.29B (new RTA Protocol claims), r. 45.29D (EL/PL Protocol claims) and the decision in *Qader v Esure* [2016] EWCA Civ 1109, fixed recoverable costs apply if a claim was submitted through the relevant Protocol but no longer continues under that Protocol and the matter is not allocated to the multi-track.

The application of fixed costs is therefore quite straightforward. If a seemingly low value claim begins life in a Protocol but later becomes more complex and/or increases in value, and subsequently exits that Protocol, it will be subject to fixed costs if settlement is reached before allocation to the multi-track.

This is the scenario we are finding to be quite common in practise and something which practitioners should become familiar with in order to avoid the pitfalls of fixed recoverable costs.

### What should you do to avoid fixed recoverable costs before/during the claim?

Prevention is always better than remediation.

There are two immediate and obvious ways in which fixed recoverable costs can be avoided although both require attention to case management. They are as follows:

- by not submitting the claim via the Protocol in the first instance (providing, of course, there is reasonable justification) resulting in the claim not falling within the remit of CPR r. 45.29B/D; and
- by ensuring that the claim is allocated to the multi-track as soon as possible or, if possible, delaying settlement until after allocation

The first method will likely require time to be spent by senior fee earners assessing the potential quantum of claims at the outset in an effort to avoid incorrectly submitting claims via the Protocol. It also carries an element of risk in that the defendant may be ordered to pay no more than fixed recoverable costs in the event that 'the court considers that the claimant has acted unreasonably by valuing the claim at more than £25,000, so that the claimant did not need to comply with the relevant protocol' (CPR r. 45.24 refers). Ergo the suggested involvement of more experienced fee earners at the outset so as to ensure the correct evaluation of the claim. Although costly, it will arguably be time well spent when hourly rates costs are obtained over fixed costs.



**Many practices would benefit from a 'damages re-evaluation policy' requiring experienced fee earners to proffer a second pre-action opinion on quantum**

The second method should not be relied on as a standard practice as it is not always within the claimant's control. For example, the defendant could make an acceptable Part 36 offer, more than 21 days prior to the initial CMC, which would likely

result in settlement pre-allocation. Even if the claim did not settle and was later allocated to the multi-track, the defendant could still raise the argument that had the claimant accepted the offer within the relevant period, fixed costs would have applied.

### **What can you do if fixed costs apply?**

If fixed costs apply once the substantive claim has settled then the claimant has a couple of possible avenues.

Firstly, an application could be made pursuant to CPR r. 45.29J, which allows the court to, if it considers that there are exceptional circumstances making it appropriate to do so, summarily assess the costs or make an order for an amount of costs which is greater than fixed costs.

The key part of this provision is that there must be 'exceptional circumstances'. Whether a case is exceptional or not will turn on its own facts but no definition of an 'exceptional circumstance' is provided within the provision and it is not yet known, due to a distinct lack of case law on this particular issue, what threshold will need to be met in order to satisfy this condition. We do, however, know that the threshold for proving exceptional circumstances was quite high under the previous fixed recoverable costs provisions (which are now covered under CPR r. 45.13) and therefore one would assume the threshold will be of a similar level.

Secondly, an application could be made pursuant to CPR r. 46.13(a), which reads: 'Where the court is assessing costs on the standard basis of a claim which concluded without being allocated to a track, it may restrict those costs to costs that would have been allowed on the track to which the claim would have been allocated if allocation had taken place.'

If the claim would have been allocated to the multi-track there may be an argument to say that, had allocation taken place, fixed costs would not have applied. However, this argument is highly

unlikely to succeed due to the unambiguous wording of CPR r. 45.29B/D: it is quite clear that fixed recoverable costs apply to all relevant claims not allocated to the multi-track.

CPR r. 45.29B reads that: 'for as long as the case is not allocated to the multi-track, if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31st July 2013, the only costs allowed are the fixed costs in rule 45.29C.'

CPR r. 45.29D reads the same save that it refers to the claims started under the EL/PL Protocol.

It may therefore be that this argument is used in support of an application made pursuant to CPR r. 45.29J rather than as a standalone application.

### **What happens if the court considers there to be (or not to be) 'exceptional circumstances'?**

If the court is persuaded that exceptional circumstances exist, it will either summarily assess the claimant's costs or make an order for detailed assessment of the claimant's costs.

However, litigators should beware that there is a possible sting in the tail. If the claimant's assessed costs are less than 20% greater than the fixed recoverable costs they would have recovered had they not obtained an order for hourly rate costs, the court will only allow the lower of assessed costs and fixed recoverable costs, and may order that the applicant pay the costs of the assessment (CPR rr. 45.29K and 45.29L refer). It will therefore be necessary to undertake an analysis of the likely recovery of assessed costs before making such an application.

Take time to assess claims upon receiving initial instructions and consider whether a letter of claim is more appropriate than submission via the Protocol as the costs implications of these initial steps can be substantial.

***Please contact David Disney to discuss any query relating to this article. David is based at our Bristol office and can be contacted on 0117 929 4000.***

## The New Electronic Bill of Costs: The 92<sup>nd</sup> update to the Civil Procedure Rules has brought into effect arguably one of the most significant and revolutionary changes in the costing world – the new electronic bill of costs which became mandatory in the SCCO and County Courts from 6 April 2018

*Donna Attwood discusses the realities of electronic billing and the intention behind its implementation.*

We are all familiar with the traditional paper-style bill of costs. This type of bill is based on a Victorian account book and has been widely used for many years. But things changed dramatically on 6 April 2018 with the advent of the electronic bill.

### What is it supposed to achieve?

It was intended that electronic bills would provide greater transparency in terms of the amount of costs being claimed; be more user friendly as it is easier to amend figures; and less expensive to prepare. The new bill of costs is self-calculating and easier to understand where costs have been incurred – particularly where a costs budget has been agreed. It is, however, far from ideal.



It was said by Sir Rupert Jackson that the paper bill of costs “is based on a Victorian account book and makes no use of modern technology”

### The new rules

The new Practice Direction to CPR Part 47 states that bills of costs for detailed assessment must be in electronic format and be compliant with the relevant rules. A model electronic bill has been provided in the form of Precedent S, which is an Excel document, although it is not compulsory to use this version. The judiciary have, however, been trained in Excel so it may be a good idea to ensure that any bill is prepared in Excel format. The Association of Costs Lawyers are of the view that Precedent S is an overly complex document and so have drawn up their own version, which includes space for points of dispute and formal replies to be included on the same document; it also enables settlement calculations to be undertaken quite easily.

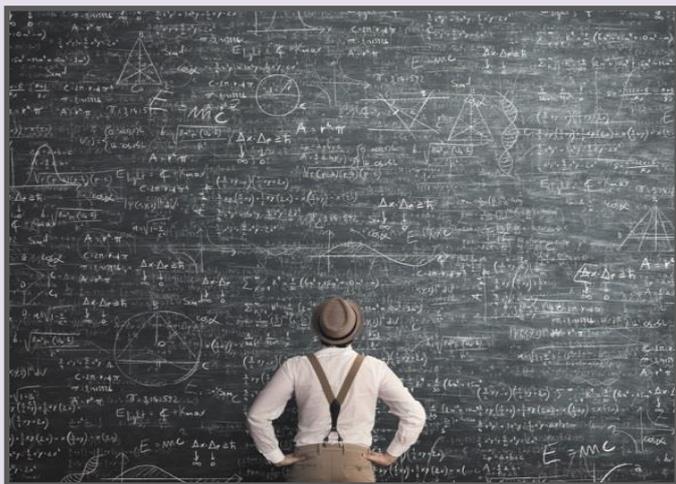
Electronic bills of costs apply to all Part 7 multi-track claims except where proceedings are subject to fixed or scale costs, cases where the receiving party is a Litigant in Person and, of course, where the court has ordered otherwise. The new bill relates to costs recoverable between the parties for work undertaken on or after 6 April 2018. For work preceding this date an old style bill of costs can be prepared, although equally a solicitor may choose to prepare an electronic bill for the entire matter.

Whenever electronic bills are served or filed at court, a hard copy must also be provided. Given the number of tabs in the Precedent S and the number of columns on each tab this could lead to the bill of costs being a very substantial document indeed.

### Why might it be more complex than intended?

Work is recorded by reference to Phase, Task and Activity and it is necessary to include the work in the bill on a line by line basis. It appears that the intention of moving towards the electronic bill of costs was so that they could be prepared directly from a solicitor’s case management system, thereby reducing costs. However, this has proved largely unworkable as the majority of firms do not

enjoy the luxury of sophisticated (and costly) software.



**The new format electronic bill of costs is proving cumbersome and no less difficult to prepare**

It is clear that due consideration must be given to the file in order to ensure that solicitor/client work is excluded, that privileged documents and client confidentiality is maintained and that any work subject to adverse costs awards is not included. Moreover, the majority of firms are simply not allocating their time into the new (and mandatory) Phase, Task and Activity categories.

There are certainly areas for improvement. It is very easy to make a mistake in the Excel document which, regrettably, is not always picked up by all formulas embedded within the Precedent S. It also appears that rather than reducing the time taken to prepare a bill of costs, the amount of time required has actually been increased significantly by the need to include work on a line by line basis and then categorise the same accordingly.

***Please contact Donna Attwood to discuss any query relating to this article. Donna is based at our Birmingham office and can be contacted on 0121 643 0001.***

A promotional banner for John M Hayes & Co. featuring a 25% discount on the first three inter partes files. The banner includes the text "25% discount on your first three inter partes files" and "Voucher to be used by 31 December 2018". The logo for John M Hayes & Co. is also visible.

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## **Resolving the CPR r. 45.24 Lacuna:** The Court of Appeal in *Williams v The Secretary of State for Business, Energy & Industrial Strategy* [2018] EWCA Civ 852 finds a way to apply fixed Protocol costs to non-Protocol cases

**Christopher McClure** analyses the adverse consequences of incorrectly failing to submit a claim via the EL/PL Protocol.

The facts surrounding the claim are academic. What is material is that a claim (against a former employer for personal injury arising from noise induced hearing loss) which should have begun life on the EL/PL Protocol did, in fact, not.

The lacuna in the rules arises from the fact that neither the Protocols nor CPR r. 45.24 provides for a mechanism which applies fixed costs (or, in fact, any costs regime) to a claim in circumstances where the claim: (i) should have been placed on the relevant Protocol but was not; or (ii) having been placed on the Protocol the claimant then elects not to continue with that process – and that in either case (i.e. (i) or (ii)) the claim has not been the subject of Part 7 proceedings and judgment.

The question faced by the Court of Appeal was whether such a claim should be limited to fixed costs and, if so, how that could be done.

At first instance, DDJ Morris awarded the claimant Protocol costs by reference to CPR r. 45.24(2)(c) – a decision which was overturned (clearly correctly by reference to the wording of r. 45.24) by HHJ Godsmark QC on that basis that “CPR part 45.24 [cannot be read] as applying when express conditions are not met.” On that basis, however, the Judge held that as “the claim was not brought within the protocol and there are no fixed costs [the] claimant is entitled to costs on the standard basis.” HHJ Godsmark QC did, however, infer that the court on assessment of costs might well

conclude that fixed costs were the appropriate sum.

The Court of Appeal went a stage further. Coulson LJ agreed that CPR r. 45.24 did not apply but then limited the claimant to fixed costs by applying the general conduct provisions under CPR Part 44. Said he:

*“Although Judge Godsmark QC may have had Part 44 in mind, I would allow the appeal on the second ground. In a case where the Protocol should have been used, and its non-use was unreasonable then, pursuant to the Part 44 conduct provisions, the claimant will usually be entitled to recover only the fixed costs and the disbursements permitted by the Protocol.”*



**Unjustified failure to use the relevant Protocol will prove a costly mistake**

Whilst *Williams* specifically concerned a matter to which the EL/PL Protocol applied, there is little doubt that claimants who unjustifiably fail to use the RTA Protocol in a situation to which CPR r. 45.24 does not apply would likewise be limited to fixed Protocol costs by virtue of CPR Part 44. The rule from the EL/PL Protocol relied upon by the Court of Appeal in reaching its decision (paragraph 7.59) is, after all, repeated essentially verbatim in the RTA Protocol at paragraph 7.76.

Had the claim in *Edwards* begun life in the Protocol there was nothing to say that it would have exited the Protocol. On the basis, then, that Protocol costs should have applied, it is difficult to argue with the decision of the Court in *Edwards*.

But what would be the situation if, hypothetically speaking, the same matter would have properly exited the Protocol.

Noteworthy is the wording at CPR r. 45.29A (i.e. the CPR Part 45, Section IIIA fixed recoverable costs regime) that ‘nothing in this section shall prevent the court making an order under rule 45.24.’ This provision would appear to support the contention that a matter which, unjustifiably so, was not placed on the relevant Protocol but which, had it been submitted via the Protocol, would have legitimately exited the Protocol (and therefore otherwise be subject to fixed recoverable costs under CPR Part 45, Section IIIA), may nevertheless be subject to Protocol costs only.

This argument is fortified by reference to CPR rr. 45.29B and 45.29D which unambiguously state that fixed recoverable costs apply where a Claim Notification Form has been submitted.

Claimants may, however, seek to argue that fixed recoverable costs apply to the case in point on the premise that rr. 45.29B and 45.29D are phrased in such a way that their application to non-ex-Protocol matters is not expressly proscribed (i.e. the aforementioned rules state when fixed recoverable costs do apply – not when they do not apply). And perhaps with some degree of irony, a claimant may thus seek to rely upon the decision in *Edwards* in support of its contention that the court may exercise its general discretion pursuant to CPR Part 44 to apply fixed recoverable costs (as opposed Protocol costs) in its favour.

As a final thought, claimant solicitors must now be alive to the fact that defendants in cases which, in terms of procedure, are materially indistinguishable from *Williams* may now make Part 36 Offers on costs with certainty.

***Please contact Christopher McClure to discuss any query relating to this article. Christopher is based at our Manchester office and can be contacted on 0161 835 4087.***

## Technical Costs Service

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Contact: [marc.banyard@johnmhayes.co.uk](mailto:marc.banyard@johnmhayes.co.uk)



**David Disney**  
Complex costs negotiations, costs budgets and group claims

Contact: [david.disney@johnmhayes.co.uk](mailto:david.disney@johnmhayes.co.uk)



**Donna Attwood**  
Electronic bills, costs budgets and costs management

Contact: [donna.attwood@johnmhayes.co.uk](mailto:donna.attwood@johnmhayes.co.uk)



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# COMPANY NEWS

## **Manchester Office Relocate due to Expansion:** After five years in the Northern Quarter staff at our Manchester office have taken root close to the Civil Justice Centre

*The Manchester office of **The John M Hayes Partnership** has moved to Suite B, 2 - 5 City Point, 156 Chapel Street, Manchester, M3 6BF.*

The John M Hayes Partnership was established in 1985 in Chesterfield. Fast-forward 33 years and The John M Hayes Partnership is now an industry leading brand with nine offices and national coverage throughout England and Wales.

The first Manchester branch officially opened in 2001. Since that time we have helped literally thousands of solicitors throughout the North West of England recover millions of pounds in legal costs.



**The Manchester Civil Justice Centre**

Christopher McClure, Regional Manager (North West), said of the relocation: “For a number of reasons this represents a special milestone for our company. We are a close-knit team here at Manchester and it is testament both to the quality of our work and commitment to clients that we continue to expand in the face of reforms which,

for many of our competitors, have simply proved too much.”

Nicknamed ‘the filing cabinet’ because of the cantilever floors at each end of the building, the Manchester Civil Justice Centre was completed in 2007 and houses Manchester’s County Court, the Manchester District Registry of the High Court, the city’s Family Proceedings Court, the District Probate Registry and the regional and area offices of Her Majesty’s Court Service.

## **Rewarding Talent and Longevity:** Four promotions within the Company and Stephen Porter recognised for a decade of loyal service

***The John M Hayes Partnership** has promoted four of their internal team to senior roles within the company.*

Christopher McClure, Regional Manager (North West), and Laura Bennett, Regional Manager (South East), have been promoted to Associate level. Senior Costs Draftsman Kenny Shealey has taken on the role of National Legal Aid Training Co-ordinator and Donna Attwood will lead the Midlands team following the retirement of Philip Morris after 25 years of service.

Kate Oliver, Chief Executive, said: “These promotions recognise the fantastic contribution these individuals have made to the firm and further strengthen the business for the future.”

### **National recognition**

Christopher is an expert in technical *inter partes* costs matters and is known for his eye for detail and gritty determination to see things through. He is currently developing a series of *inter partes* seminars for all litigators seeking clear guidance

on how to litigate with costs in mind. Christopher said: “There is little doubt within the costing industry that The John M Hayes Partnership has a reputation for preparing claims in publicly funded matters which is second to none. What is, however, perhaps less well-known is that we are equally adept at dealing with *inter partes* costs and my first concern as Associate is to ensure that The John M Hayes Partnership is nationally recognised as such.”

### **Legal aid costs**

Laura brings a wealth of talent and experience to the team around client care, human resources and business development and will work closely with Kenny Shealey to strengthen the company’s legal aid partnerships.

Laura sees the role as a great opportunity: “Chris and I will be working alongside the Board to spot business and growth opportunities. I will be developing my role with people across the company and I look forward to working closely not only with the team in my Region but across all offices.”

### **Expert knowledge**

Laura and Kenny have recently delivered a popular series of live, national seminars on maximising legal aid costs and GDPR. Kenny said: “I was really pleased to be offered and to have accepted this exciting role with the prospect of applying my knowledge to help develop the company by securing more legal aid work.”

Kenny’s specialist legal aid knowledge makes him the ideal candidate to maintain the company’s visionary year-long training programme for new recruits.

### **Midlands Region**

Donna has been with the company for over seventeen years supporting Philip Morris in his role as Regional Manager. A specialist in electronic bills, Donna’s caseload focuses predominantly on group travel litigation claims, where she leads a separate costs team in the

office to deal with what are often complex matters.

When asked what the new role means to her, Donna said: “I am very much looking forward to my new role and the opportunity that has been presented to lead a team of experienced costs draftsmen based in our two Midlands offices. We pride ourselves on the quality of our work and the exceptional level of service we provide to clients and I am keen to maintain all our existing client relationships – hopefully developing some new ones along the way. As a costs lawyer I will still be heavily involved in all areas of costs and am looking forward to leading the team into the new electronic era!”

### **Top talent to deliver first class service**

Kate Oliver concluded: “I am delighted that Christopher, Laura, Kenny and Donna have been recognised for their contribution to the company and promoted to senior roles. It is important to the company that we continue to promote and develop from within and we are proud of the opportunities for career progression we offer our people. We know that by encouraging and challenging our staff we will continue to help them deliver a first class service to all our clients.”

### **A decade of loyal service**

It is entirely appropriate that Stephen Porter is recognised for 10 years’ loyal service at The John M Hayes Partnership. Stephen’s Regional Manager and colleague, Christopher McClure, had this to say: “Stephen is simply first class. He consistently achieves excellent results for clients through hard work and diligence and there is very little he cannot do. Stephen is an absolute pleasure to work with and both I and the company are indebted to him for a decade of loyal service.”

Stephen is located at our Manchester office and regularly prepares claims for costs in *inter partes* and publicly funded matters.



## We have a wealth of experience in dealing with costs recovery in the following areas:

### Our Legal Aid services cover:

- High Cost Case Plans
- CCMS Bills
- Bills of costs to be recovered from the LAA
- Claim 1/Claim 1As and Claim 2 forms
- Bills of costs to be recovered from a paying party/losing party (see Inter partes for full details of services)
- High Cost Case Plans
- Legal Help Claims
- Extradition Proceedings
- Appeals against LAA assessments and rejections
- Representation at court of review and assessment hearings
- Post assessment certificates, claims and EX80 forms
- Troubleshooting

### Our Inter Partes services cover:

- Personal Injury
- Clinical Negligence
- Housing Disputes
- Commercial Litigation
- Immigration
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# The 5<sup>th</sup> Legal Aid Agency Annual Report 2017/18: In three parts we examine the more noteworthy points from the 5<sup>th</sup> Annual Report

In part one **Kenny Shealey** examines five key statistics from the 5<sup>th</sup> Annual Report.

## Statistic 1: Number of legal aid applications processed

Over the past year the Legal Aid Agency (“LAA”) has processed over 500,000 applications for legal aid. Although this figure looks high, far more people would qualify for legal aid but for a decade of government cuts, an increase to the threshold for legal aid and the need to adduce evidence of domestic violence in support of most applications.

## Statistic 2: Increase in number of public funding certificates granted

Certificates granted for family work increased by 5% in January to March 2018 compared to the previous year. Public family law work makes up around three-quarters of the family workload and over 80% of family expenditure.



There has been a marked increase to the number of legal aid applications granted by the Legal Aid Agency

## Statistic 3: Increase in applications supported by evidence of domestic violence or child abuse

In January to March 2018, applications for civil representation supported by evidence of domestic violence or child abuse increased by 21% compared to the same period in 2017. The

number of applications granted also increased by 14% compared to the same period in 2017.

## Statistic 4: Faster processing times

By working digitally and adopting simpler and smarter ways of working, the LAA have processed 97% of applications for civil legal aid in 15 working days, processed 100% of applications for criminal legal aid in two working days and paid over 530,000 bills; this equates to the LAA paying 98% of complete and accurate bills within 20 working days, which exceeded the LAA’s target of 90%.

## Statistic 5: Two minutes and twenty-four seconds to answer your call

The LAA have claimed that on average your calls were answered within 2 minutes 24 seconds for civil legal aid queries and 1 minute 50 seconds for criminal legal queries. Perhaps the more pertinent statistic is how long, on average, callers are being kept on hold!

In part two **Kenny Shealey** considers four key objectives outlined in the 5<sup>th</sup> Annual Report.

## Objective 1: Build strong relationships across government and justice system

The Report states that: ‘The LAA has worked with both legal aid providers and stakeholders to ensure and identify improvements to the way that they work. The Provider Engagement team over the past year has streamlined the processing of Special Children Act cases to reduce processing times.’

A key achievement over the past year for the LAA has been working with the Ministry of Justice to implement changes to the domestic violence evidence requirements. The importance of these changes in facilitating increased access to legal aid for the most vulnerable in society cannot be overstated.

Moreover, in the past year the LAA implemented new Criminal Legal Aid contracts with 1,299

providers to ensure that criminal representation is available to all.

### **Objective 2: Secure value for money for the taxpayer in all that they do**

The Report says: “Through good financial stewardship, the LAA have maintained a net error rate of below 1%. The LAA have also achieved a reduction in their administration spend compared with 2016-17.”

Regrettably, the Report does not inform its reader as to level of reduction achieved.

### **Objective 3: Achieve their full potential through being fair, proud and supportive**

The Report reads: “The LAA are maintaining a culture which places great value on commitment, resilience and teamwork. The LAA are in the top 10 (of 98 Civil Service organisations that participated) for 8 out of the 9 categories.”

### **Objective 4: Digitalisation**

During the first three quarters of 2017/18, 97% of initial contact to the LAA, including the submission of applications and bills, took place online.



**Online digitalisation is cited as a key objective by the Legal Aid Agency in measuring its own success**

On the whole this has been positive. However, the information we continue to receive from providers is that, at times (and normally during working hours), CCMS can be very slow indeed. This naturally leads to an increase in the time taken to

submit a claim which, frustratingly, is time the LAA will not pay.

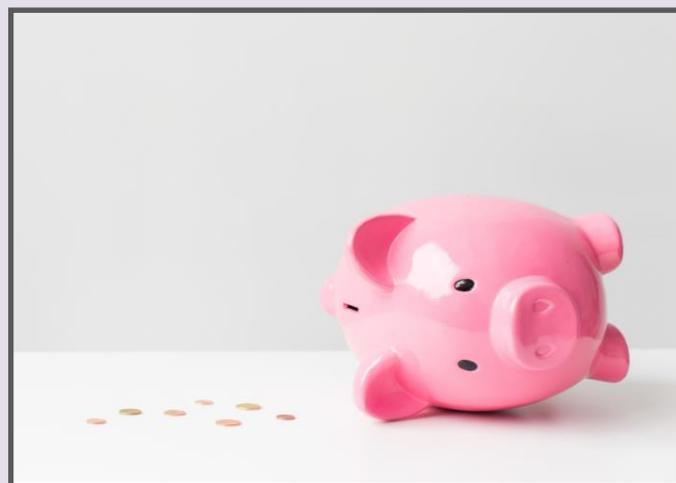
*In part three **Kenny Shealey** summarises the key points from the 5<sup>th</sup> Annual Report.*

### **Errors made by the Legal Aid Agency**

The LAA acknowledges that, due to the complexity of the legal aid eligibility assessments and payment matrices, there is an inherent risk of error at various stages throughout the process.

The LAA do, of course, maintain that they remain entirely committed to identifying and addressing the root cause of these errors and strengthening both internal controls and provider compliance.

The LAA’s estimated gross error for 2017/18 was £22 million. Regrettably, the LAA appear focused on recovering overpayments rather than compensating providers who have been underpaid.



**The Legal Aid Agency estimates the cost of errors made in the 2017/18 financial year as £22million**

### **Rejection Fixes**

If you suspect an incorrect reject or document request, you should email the LAA at [laacivilclaimfix@justice.gov.uk](mailto:laacivilclaimfix@justice.gov.uk). The LAA should respond within 24 hours (as is their target) and will remove any incorrect mark against your KPIs, or purge the document request, from the system.

## Conclusion

There has been an increase to the rate at which the LAA deal with applications for public funding and paying completed bills submitted via the CCMS portal. Usually, however, it is the system itself which is the major factor for delay in submission and payment. It is hoped that the LAA will continue to listen to provider concerns in an attempt to resolve these issues in readiness for the implementation of the 2018 Standard Civil Contract.

*Please contact Kenny Shealey to discuss any query relating to this article. Kenny is based at our London office and can be contacted on 01494 728 301.*

**Improving your Cashflow through Payments on Account:** Claiming payments on account regularly will markedly improve your cash flow

*Kenny Shealey considers the best methodology and tactics for obtaining a payment on account and managing cash flow.*

## Payments on account in respect of disbursements

If you have incurred any type of disbursement, did you know that you can request a payment on account ("POA") in relation to that disbursement?

A POA can be applied for at any point during the period of the public funding certificate providing, of course, that the final bill has not been submitted.

POA requests which relate to disbursements of £20 or more (including VAT) must be supported with evidence – usually the disbursement voucher itself.

It only takes 6 minutes (at least that is what the LAA considers as reasonable) to submit your POA request.

## Payments on account in respect of provider profit costs

A provider must wait three months from the grant of the funding certificate before a POA request can be made. Moreover, a POA request in respect of profit costs can only be made twice in one 12 month period. This is a rolling 12 month period and begins from when the initial profit costs POA request is authorised – not on the anniversary of the certificate being issued. Tactically, it is sound practice to consider when to make a POA request in order to maximise the amount you can receive from the LAA.



**Properly making requests for payments on account are an excellent way of lubricating cash flow**

In family cases the costs of all proceedings and FAS should be included within the POA request. Providers are unable to claim separate profit costs payments for FAS or the different aspects of a case.

In CCMS you will need to enter 100% of the profit costs incurred to date and CCMS will calculate the 75% figure that will be paid to the provider.

Once the POA request has been submitted, the provider will receive a document request via CCMS. It is important to upload the relevant documents as the LAA cannot process the POA request until all supporting documentation has been submitted.

## Errors in making a payment on account request

A POA request can be recouped in the following situations:

- where duplicate POA requests have been submitted in error;
- a POA request had been submitted against an incorrect case; or
- an incorrect amount has been requested

Where the amount paid is incorrect the full POA must be recouped to enable the provider to submit a correct POA request.

***Please contact Kenny Shealey to discuss any query relating to this article. Kenny is based at our London office and can be contacted on 01494 728 301.***

## **The 2018 Standard Civil Contract – The Devil’s in the Detail: We consider the small print from the impending 2018 Contract**

*Kenny Shealey explores the implantation of the 2018 Standard Civil Contract and outlines the main changes to be implemented.*

The tender for the 2018 Contract finally opened on 19 September 2017 and closed on 10 November 2017 following considerable delay due to the snap general election.

The 2018 Contract begins on 1 September 2018 and will run for three years to 31 August 2021 with an option for the LAA to extend the Contract to 2023.

Somewhat confusingly, there are now five different Standard Civil Contracts for multiple categories:

- 2013 Standard Civil Contract: Family, Immigration and Asylum, Housing and Debt;
- 2013 Standard Civil Contract (Welfare Benefits): Welfare Benefits in London, South East, Midlands and East;
- 2014 Standard Civil Contract: Community Care and Mental Health;

- 2015 Standard Civil Contract: Against Police, Clinical Negligence and Public Law; and
- 2016 Standard Civil Contract (Welfare Benefits): Welfare Benefits in the North and South West & Wales

The benefit of the 2018 Contract is that it will align all existing contracts into a single Contract. This will replicate the situation when the Standard Civil Contract was first introduced in 2010 and will make it easier for practitioners to have reference to a consolidated document rather than multiple documents.



**On 1 September 2018 all existing Civil Contracts will be consolidated into the new Standard Civil Contract 2018**

### **‘Points of Principle of General Importance’**

The 2018 Contract now removes ‘Points of Principle of General Importance’. These were used to seek clarification on provisions within the contract or other guidance published by the LAA which related to the assessment of costs.

The removal of these provisions will likely afford the LAA greater discretion during the assessment process meaning, ultimately, heavier reductions on assessment.

### **Instruction of interpreters and translators**

Paragraphs 2.47 - 2.51 of the 2018 Contract requires providers to use interpreters who hold specified qualifications. Using freelance interpreters may therefore become a thing of the past. Furthermore, paragraph 2.49 stipulates that providers ‘must place a note on file confirming

either that the interpreter has certified to you that they hold one of the [specified] qualifications or alternatively that the interpreter has been supplied by a recognised agency (the details of which must be specified) and that such agency has performed its own assessment of the interpreters' qualifications and suitability to provide the services required.'



Save for in exceptional circumstances providers may only instruct interpreters whose qualifications meet those specified at paragraph 2.48 of the 2018 Contract

The LAA retain the right to refuse to pay the interpreter's fee in the event that the aforementioned note is not placed on the file.

### Disbursements (non-codified)

Paragraphs 4.24 - 4.28 of the 2018 Contract make for interesting reading. Essentially, where a provider intends to incur a disbursement in respect of which the level of remuneration is not specified by the Regulations, written quotations from at least three separate providers of the services to which the disbursement relates must be obtained and kept on file. It will be interesting to see how much, if any, of the time spent obtaining quotes for non-codified disbursements the LAA will allow on assessment.

### Hourly rates enhancements

At paragraph 6.14 the 2018 Contract states: 'Where we or the court consider that any item of work should be allowed at more than the Prescribed Rate, we may apply to that item of work a percentage enhancement.' By replacing

the previous wording 'it shall' with 'we may apply', paragraph 6.14 appears to afford the LAA scope to ignore otherwise legitimate justifications for enhancement. Fortunately, the courts on assessment retain authority to assess any enhancements claimed in bills of costs.

### Summary

Regrettably, the new 2018 Contract appears more intrusive and restrictive than the Contracts it purports to consolidate. Subtle changes to wording appear to afford the LAA a greater degree of latitude (or latitude *per se*) than it previously enjoyed. The obvious concern for providers is that the LAA will always endeavour to exercise any discretion in its favour. After all, the Ministry of Justice recently mandated to reduce spending from £6.6billion in 2017/18 to £6billion by 2019/20.

***Please contact Kenny Shealey to discuss any query relating to this article. Kenny is based at our London office and can be contacted on 01494 728 301.***

**Running for Shelter – Fixed Costs and Legal Aid:** At a time when fixed costs are being extended at an unprecedented rate solicitors must ask themselves: "Is there a safe place to hide?"

***Christopher McClure offers some belated advice and encouragement to practitioners who represent clients in civil claims funded by the Legal Aid Agency.***

For some, the sad reality is simply that there is no shelter of refuge. Those who are unable (or unwilling, as the case may be) to fundamentally consider and reconsider the way their practice operates will no longer be able to practise as profitably – or even profitably *per se*.

As the Court of Appeal in *Broadhurst and Taylor v Tan and Smith* [2016] EWCA Civ 94 recently reminded us, fixed costs are conceptually different from assessed costs. Whereas the latter are awarded by reference to the work actually undertaken on behalf of the client, fixed costs are granted essentially without regard to the amount of work undertaken by the solicitor. Profitability therefore becomes synonymous with economy and efficiency.

The current fixed costs regimes can and, for many, do work. But as the fixed costs net widens and increasing numbers of solicitors are thereby subject to working under a given system, it will become increasingly important for fee earners to make the system work for them as the stream of hourly rates billable work, essential to supplementing – or even creating – profit margins, becomes increasingly narrow.

Perhaps, however, in a strange but rewarding way, those solicitors who have traditionally worked at something of a regular undervalue may yet find themselves in the proverbial bunker.

Whilst some legal aid work has, at least since 2007, been subject to fixed costs, publicly funded civil cases remain exempt and, as far as we are aware, there are no plans to change that.

But the point goes much further than this.

Courts have discretion to award a publicly funded party their *inter partes* costs on either the standard or indemnity basis. In such situations, the indemnity principle is dis-applied and the publicly funded receiving party, who thereby enjoys costs protection, is now entitled, via their solicitor, to recover costs from their opponent at *inter partes* rates.

Thus civil legal aid practitioners who are adept at securing costs awards for their clients may yet glean the best of both worlds (or whatever is left of them post-Jackson) in the sense that, firstly, publicly funded civil work is unlikely to become subject to fixed costs; secondly, clients who have the benefit of being publicly funded have the

additional benefit of costs protection; and thirdly, there is usually the potential to secure hourly rate costs at the higher *inter partes* rate.



**There is no better way to maximise recovery of your publicly funded costs than to obtain an award for costs against your opponent**

The recovery process is, however, far more involved in cases where the receiving party has the benefit of a costs award. It will usually be necessary to draft a 6-column bill of costs with a view to kick-starting the CPR Part 47 costs assessment process.

The John M Hayes Partnership is recognised for its expertise in preparing and negotiating claims for costs in publicly funded matters where the court has made an award for costs in favour of your client.

If you are a fee earner who practises in civil publicly funded work and would like to learn more about how to maximise your costs through *inter partes* awards, please get in touch and we will be happy to assist.

**Please contact Christopher McClure to discuss any query relating to this article. Christopher is based at our Manchester office and can be contacted on 0161 835 4087.**

A promotional banner for John M Hayes Partnership. The background is dark purple with a photograph of three people in business attire. The text is white and reads: "25% discount on your first three legal aid files". At the bottom, it says "Voucher to be used by 31 December 2018" and features the John M Hayes logo with "EST 1985".

**25% discount**  
on your first three  
legal aid files

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# IN OTHER NEWS

## **Climbing for Justice:** Raising funds for Access to Justice by climbing Mount Snowdon

*Shaun Williams shares his experience of climbing Mount Snowdon for Access to Justice.*

On 12 August 2018 eight intrepid costs draftsmen travelled from all over the country to climb Snowdon together and represent The John M Hayes Partnership on our 'Climb for Justice'.

We met up beforehand and caught the bus to Pen-y-pass to start our trek up the Miners Track. This starts with a fairly steady walk before ascending well-built steps to join the Pyg Track. After a final push to the top we huddled together for a quick photograph and headed for the café to dry off and get a well-earned hot drink!



**At the summit of Mount Snowdon**

After lunch we headed down the mountain on the longer but steadier Llanberis Path with its loose rocks to negotiate. The clouds cleared briefly and so we seized the opportunity to take a few more photographs. Our guide later told us that we did the climb faster than any other group they've had of our size. Although we had very sore legs the following day, we are proud that we all managed to complete the walk and sponsor a good cause.

## **Bon Voyage:** Kate Oliver's sailing experience had consisted of a day on Otley Tarn before she boarded a vessel in Poole for a four-day sea adventure

*Kate Oliver set sail on 11 May 2018 to mentor and inspire female students who were struggling to fulfil their potential.*

An article in The Yorkshire Post and a strong desire to help young women had led to Mrs Oliver's decision to volunteer as a mentor for the trip which pairs students and inspirational women leaders in the unusual setting of sail training.

The charity-run project, Leading Lights, run by national charity Ormiston Trust, aims to inspire the next generation of female business leaders through sailing. "I had been working extremely hard because the company had been through a challenging period of restructuring and I wanted to do something completely different", said Mrs Oliver, the Ilkley-based chief executive of national law costs draftsman John M Hayes.

After reading a plea for volunteers on the Leading Lights trip in The Yorkshire Post, Mrs Oliver said she rang the charity straight away for more information. "I have four children and one stepson and the youngest has just turned 18. I know how challenging it is for people of that age now and I wanted to help. I've always adored the sea", she said. A few weeks later, Mrs Oliver joined three other mentors – female directors from Condé Nast, Bloomsbury and GlaxoSmithKline – plus eight female students, their teacher and the sailing crew on board training vessel Prolific which set sail from Poole Harbour.

Both students and professionals alike – many of which had never sailed before – were actively

involved in every aspect of sailing the boat, from hoisting and lowering sails, steering, getting involved with navigation, anchoring, cooking and keeping watch.



**Kate and the girls boarded Prolific on 11 May 2018**

Alongside sailing activities, the female executives spent time chatting with and mentoring the students, talking to them about their careers, providing advice and helping to build students' confidence. "These girls had a lot of potential but weren't delivering for one reason or another," said Mrs Oliver. "The best part of the trip was just being in the presence of young people, listening to their hopes and thoughts about the future. I was able to chip in with my own experiences as a working mum. It's not always been easy and I've faced my own personal challenges, which I could share. Shortly after the trip I received a note to say two of the girls had gone on to be head of their house at school, which wouldn't have happened if they hadn't had that experience."

The most challenging part of the trip was coping with the sea sickness on the first day. "Everyone was so sick that day and it was so personally challenging. It got to the point where I wanted to be helicoptered off. It was worse than childbirth", she said. But once it passed, she said the experience brought the women together. "I could have run away but I stayed and I was absolutely fine and I hope at some level that message was something that the girls took away from the experience."

# CONTRIBUTORS

**Christopher McClure**, Associate and Regional Manager (North West), is based at our Manchester office and leads our Technical Costs Service team. Chris can be contacted on **0161 835 4087** or [christopher.mcclure@johnmhayes.co.uk](mailto:christopher.mcclure@johnmhayes.co.uk)

**David Disney**, Director and Regional Manager (Wales and South West), is based at our Bristol office and specialises in costs management. David can be contacted on **0117 929 4000** or [david.disney@johnmhayes.co.uk](mailto:david.disney@johnmhayes.co.uk)

**Donna Attwood**, Team Leader (Midlands) and Costs Lawyer, is based at our Birmingham office and specialises in electronic billing and costs management. Donna can be contacted on **0121 643 0001** or [donna.attwood@johnmhayes.co.uk](mailto:donna.attwood@johnmhayes.co.uk)

**John Hayes**, Chairman, is based at our Chesterfield office and can be contacted via Stephanie Waterfall on **01246 450 184**

**Kate Oliver**, Chief Executive Officer, is based at our Leeds office and can be contacted on **01943 601 350** or [kate.oliver@johnmhayes.co.uk](mailto:kate.oliver@johnmhayes.co.uk)

**Kenny Shealey**, National Legal Aid Training Co-Ordinator and Senior Law Costs Draftsman, is based at our London office and specialises in preparing claims in publicly funded matters. Kenny can be contacted on **01494 728 301** or [kenny.shealey@johnmhayes.co.uk](mailto:kenny.shealey@johnmhayes.co.uk)

**Lee Coulthard**, Regional Manager (North East), is based at our Leeds office and specialises in retainer-related issues. Lee can be contacted on **01943 601 350** or [lee.coulthard@johnmhayes.co.uk](mailto:lee.coulthard@johnmhayes.co.uk)

**Shaun Williams**, Assistant Regional Manager (Wales and South West), is based at our Bristol office and specialises in preparing bills of costs in complex *inter partes* matters. Shaun can be contacted on **0117 929 4000** or [shaun.williams@johnmhayes.co.uk](mailto:shaun.williams@johnmhayes.co.uk)

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*'Bon Voyage' article written by Lizzie Murphy and published in The Yorkshire Post on 26 July 2018. Republished here with kind permission from The Yorkshire Post.*

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**Amersham (London)**

75 Woodside Road, Amersham  
Buckinghamshire HP6 6AA  
T: 01494 728 301  
DX: 400000 Amersham 3

**Birmingham**

5th Floor, White House  
111 New Street  
Birmingham B2 4EU  
T: 01216 430 001  
DX: 13207 Birmingham

**Bristol**

61 Park Street  
Bristol  
BS1 5NU  
T: 01179 294 000  
DX: 122812 Bristol Great George Street

**Cardiff**

Sophia House,  
28 Cathedral Road  
Cardiff CF11 9LJ  
T: 02920 394 043

**Chesterfield**

Suites 61/62, Dunston House  
Dunston Road, Chesterfield  
Derbyshire S41 9QD  
T: 01246 450 184  
DX: 709880 Chesterfield 4

**Leeds**

Unit B Riverside Business Park  
Dansk Way, Leeds Road, Ilkley  
Leeds LS29 8JZ  
T: 01943 601 350  
DX: 709870 Ilkley 2

**Manchester**

2-5 City Point, 156 Chapel Street  
Manchester M3 6BF  
T: 01618 354 087  
DX: 14453 Manchester 2

**Newcastle-upon-Tyne**

Suite 3, 3rd Floor, Adamson House  
65 Westgate Road  
Newcastle-upon-Tyne NE1 1SG  
T: 01912 614 666  
DX: 720201 Newcastle-upon-Tyne 19

**Sussex**

Suite 28, Century House  
100 Menzies Road  
Hastings TN38 9BB  
T: 08458 622 182  
DX: 35520 Hastings

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