

Cost Effective Resolution – Annual Defendants Seminar 25th October 2007

The information contained in this delegate pack is made available on the basis that no liability is accepted for any errors of fact or opinion. It may not be copied or reproduced without prior agreement with counsel. Please contact Sally Jones at sjones@12kbw.co.uk if you would like to re-use this information in any way.

Legal advice should always be sought on the particular circumstances of an individual case.

CONTENTS PAGE

Session 1

Is there ever a duty in tort to ensure that someone else is insured?
Nicholas Heathcote Williams QC

Session 2

Motor Insurance – RTA Article 75 or MIB central fund – who pays?
Stephen Worthington QC

Session 3

Cost-Capping
Simon Levene



12KBW Seminar: Cost Effective Resolution – The Annual Defendants
Seminar
Thursday 25th October 2007

**Is there ever a duty in tort to ensure that
someone else is insured?
Nicholas Heathcote Williams QC**

CPD Ref: AVV/CHRW

12 King's Bench Walk, Temple, London EC4Y 7EL,
Tel: 020 7583 0811, Fax: 020 7583 7228, Video Conferencing: 020 7583 4190
E-mail: chambers@12kbw.co.uk, Website: www.12kbw.co.uk, DX 1037 Chancery Lane

12
King's Bench Walk

Cost Effective Resolution –
Annual Defendants Seminar

12
King's Bench Walk

**Is there ever a duty
in tort to ensure that
someone else
is insured?**

Nicholas Heathcote Williams QC
25 October 2007

Obviously: On an Insurance Broker

- ❑ Obviously, if someone like an Insurance Broker undertakes to ensure that you are insured, he may owe you a duty of care in contract and/or – even though the risk against which he is meant to be protecting you is a risk of purely economic loss – in tort.
- ❑ But is there any other case where a person owes a duty in tort to ensure that someone else is insured?

Yes: Monk v Warbey

- ❑ In Monk v Warbey [1935] 1 KB 75:-
 - Monk was injured by negligent driving by May of a car which had been lent to Knowles and May by its owner, Warbey.
 - Neither Knowles nor May were covered by motor insurance, although it was compulsory under the Road Traffic Act 1930, and neither Knowles nor May had sufficient means to satisfy Monk's claim.
 - So Monk sued Warbey, claiming that Warbey's breach of statutory duty, in causing or permitting his car to be used without insurance, was not only a criminal offence but was also a civil wrong entitling Monk to damages.

Monk v Warbey: the Law

- ❑ Although Monk's claim was a claim in tort for purely economic loss (the damage suffered by Monk as a result of Warbey's breach of statutory duty being Knowles' and May's inability to pay), the Court of Appeal upheld the claim.
- ❑ The Court of Appeal held that a car owner who lends his car owes a statutory duty in tort to a potential victim of negligent driving to ensure that the person who borrows the car is covered by compulsory motor insurance.
- ❑ Clearly, the Court was motivated by the fact that, at that time, victims, like Monk, of uninsured drivers had no other safety net.
- ❑ It was only later that the protection for victims of uninsured drivers under what is now Section 151 of the Road Traffic Act 1988 and the MIB's Uninsured and Untraced Drivers Schemes came into existence.
- ❑ But, despite the introduction of all that protection, the Courts have repeatedly affirmed that Monk v Warbey remains good law.

5

What about Compulsory EL Insurance?

- ❑ The Employer's Liability (Compulsory Insurance) Act 1969 made employer's liability insurance compulsory and imposed a duty on the directors and secretary of any limited company not to consent to or connive at or facilitate by neglect any breach of that requirement.
- ❑ The question then arose:-
 - Would the Courts apply the rule in Monk v Warbey to compulsory EL insurance?
 - Would the Courts find that the statutory duty of the officers of a company to ensure that someone else, namely the company, has compulsory insurance, gives rise to a civil cause of action?

6

The Answer: Richardson v Pitt-Stanley

- ❑ The answer came in [Richardson v Pitt-Stanley](#) [1995] QB 123.
- ❑ Richardson was employed by Bridge Metals (Basildon) Ltd and was injured due to that company's breach of Section 14 of the Factories Act 1961 (duty securely to fence every dangerous part of a machine).
- ❑ But the company did not have compulsory EL insurance and went into liquidation.
- ❑ There was (and is) no EL Insurers' Bureau to meet claims against uninsured and impecunious employers.
- ❑ So Richardson sued four directors of the company and the company secretary for breach of their statutory duty to ensure that the company was insured.

7

But the Answer was No

- ❑ But the Court of Appeal distinguished [Monk v Warbey](#) on a number of grounds (none of which, as Stuart-Smith LJ admitted, were "compelling in themselves") and held that the duty which the officers of the company owed to ensure that the company had compulsory EL insurance was a duty owed in criminal law alone.
- ❑ It appears that the Court of Appeal was reluctant to extend civil liability for breach of statutory duty to ensure that another person is insured beyond the realm of compulsory motor insurance.

8

What about Common Law?

- ❑ So much for breach of statutory duty.
- ❑ What about common law?
- ❑ (Apart from the case of someone like an insurance broker specifically undertaking to ensure that another person is insured) can someone be under a duty in the common law of tort to ensure that another person is insured?
- ❑ This question came up in two cases decided within days of each other in the Court of Appeal:
 - [Reid v Rush & Tompkins Group plc \[1990\] 1 WLR 212](#); and
 - [Van Oppen v Bedford Charity Trustees \[1990\] 1 WLR 235](#).

9

Reid and Van Oppen: the Facts

- ❑ Reid was employed by Rush & Tompkins to work in Ethiopia. In the course of his work, he was severely injured in a car crash, but he was unable to obtain compensation from the guilty driver because there was no system of compulsory motor insurance in Ethiopia and the driver had insufficient means.
- ❑ Van Oppen was a schoolboy at Bedford School. At a time when mounting concern among Doctors about the dangers of rugby had been communicated to the School, he was rendered tetraplegic while playing rugby at the School.

10

Reid v Van Oppen: the Law

- ❑ Reid claimed that Rush and Tompkins owed him a duty of care in contract and/or in tort to ensure that he had personal accident insurance against injury in a road traffic accident in Ethiopia.
- ❑ Van Oppen claimed that the School owed him a duty of care in tort to ensure that he had personal accident insurance against injury while playing rugby at the School.
- ❑ Differently constituted Courts of Appeal rejected both claims.
- ❑ It appeared that there could be no general duty in tort to ensure that another person was insured.

11

But ...along came Gwilliam

- ❑ But a decade passed ... and along came Ms Gwilliam.
- ❑ In Gwilliam v West Herts Hospitals NHS Trust [2003] QB 443:-
- ❑ The Hospitals Trust held a fund raising fete and engaged an independent contractor, Club Entertainments, to provide as one of the side shows a "splat wall": participants were to bounce from a trampoline and stick by Velcro to the side of a wall.
- ❑ The Hospital Trust checked that Club Entertainments were competent and asked them whether they had public liability insurance and was told that they did, but did not actually ask to see the insurance policy.

12

Gwilliam: the Facts

- ❑ Ms Gwilliam, aged 63, attended the fete and gamely had a go at the splat wall, and, needless to say, was injured due to the negligent way that it had been set up by Club Entertainments.
- ❑ It then turned out that Club Entertainments' public liability insurance had expired four days before the fete and that they had insufficient means to meet her claim.
- ❑ So she sued the Hospitals Trust.
- ❑ She lost at first instance and appealed to the Court of Appeal.

13

Gwilliam: 3 Versions of the Law

- ❑ The Court of Appeal rejected Ms Gwilliam's appeal.
- ❑ But each member of the Court did so for a different reason.

14

Version 1: Lord Woolf's Version

1. Lord Woolf CJ held:-

- Under Section 2(4) of the Occupier's Liability Act 1957, the Hospitals Trust's common duty of care as an occupier could be discharged by engaging an independent contractor, provided that it was reasonable to engage an independent contractor and provided that the Hospitals Trust had taken reasonable care to check that the contractor was competent.
- In the case of a dangerous activity like the splat wall, the duty to check that the independent contractor was competent included a subsidiary duty to check that the independent contractor had public liability insurance.
- But, on the facts here, the Hospitals Trust had done enough to discharge that subsidiary duty by asking Club Entertainments whether they had insurance and accepting the answer that they had; the duty here did not extend to actually asking to see the policy.

15

Version 2: Waller LJ's Version

2. Waller LJ agreed with Lord Woolf but preferred to do so on the ground that:

- In the case of such a dangerous activity as the splat wall, the duty to check that an independent contractor had public liability insurance was not just a subsidiary part of the duty to check that the independent contractor was competent, but was a independent, free-standing duty.

16

Version 3: Sedley LJ's Version

- ❑ However, Sedley LJ took the traditional view that there was no duty in tort to ensure that an independent contractor was insured.
- ❑ Otherwise:-
 - (a) Where would the duty end? Would a householder owe a duty to the world to check that his builder was insured?
 - (b) If there had been a duty here, then on the facts, contrary to Lord Woolf and Waller LJ, the Hospitals Trust would clearly have been in breach of the duty by not asking to see the policy.

17

Majority in Favour of a Duty

- ❑ Despite Sedley LJ's trenchant dissent, the majority, Lord Woolf and Waller LJ, were clearly in favour of there being some such duty.

18

Then Along Came Bottomley

- ❑ In Bottomley v Todmorden Cricket Club [2004] PIQR P18:-
- ❑ The Todmorden Cricket Club held a firework party and enlisted the help of two unpaid pyrotechnic stuntmen who performed as “Chaos Encounter”.
- ❑ The Cricket Club did not check whether Chaos Encounter were competent or whether they had public liability insurance. Had the Cricket Club checked, the answer to both questions would have been No.
- ❑ The unfortunate Bottomley volunteered to assist Chaos Encounter and in the chaos which ensued on the night he encountered an exploding mortar and was severely burned.
- ❑ Chaos Encounter did not have the means to meet Bottomley’s claim, and Bottomley sued the Cricket Club.

Bottomley: at First Instance

- ❑ At first instance, Simon J held the Cricket Club liable under the old, binding but much criticised Court of Appeal authority, Honeywell v Larkin, which says that, in the case of extremely hazardous activities, a person is directly liable for the fault of his independent contractor.
- ❑ The Cricket Club appealed.

Bottomley: Court of Appeal

- ❑ The Court of Appeal (Brooke, Waller again & Clarke LJJ) rejected the appeal and held the Cricket Club liable but preferred to do so on a different ground than the controversial authority of Honeywell v Larkin.
- ❑ Instead, they followed Lord Woolf in Gwilliam and held that the Cricket Club was in breach of its duty to check that Chaos Encounter were competent, and that that duty included a subsidiary duty to check that Chaos Encounter had public liability insurance.
- ❑ Waller LJ added that, while the point had not been necessary to consider, it remained his view that there could be an independent, free-standing duty to ensure that your independent contractor was insured.

A Free Standing Duty? Naylor v Paling

- ❑ The concept of a free-standing duty to ensure that your independent contractor is insured then came under scrutiny in Naylor v Paling [2004] EWCA Civ 560.
- ❑ Naylor ran a night club and engaged Whitehead, an independent contractor, to supply doormen, all of whom were accredited under the local authority scheme.
- ❑ But Naylor did not check whether Whitehead and his doormen had public liability insurance. In fact, they did not.
- ❑ Paling, a customer at the club, sustained severe head injuries in being ejected from the club with excessive enthusiasm by one of the doormen.
- ❑ Paling sued Naylor.

Naylor v Paling: at First Instance

- ❑ At first instance, the trial Judge found Naylor liable effectively (since there had been no other reason to doubt the competence of Whitehead and his doormen) for breach of a free-standing duty to check that Whitehead and his doormen had public liability insurance.

23

On Appeal: a Free Standing Duty only in Exceptional Circumstances

- ❑ Naylor appealed and the Court of Appeal allowed his appeal.
- ❑ The Court of Appeal (Waller yet again, Latham & Neuberger LJJ) held that, in the absence of exceptional circumstances, there was no free-standing duty to ensure that your independent contractor has insurance.
- ❑ Exceptional circumstances suggested were the existence of:-
 - a) an extra hazardous activity; and
 - b) either a statutory duty to insure (although neither Monk v Warbey nor Richardson v Pitt-Stanley appear to have been cited to the Court) or compelling evidence that checking insurance was recognised as a normal and necessary precaution in relation to the activity.

24

- 1.(a) There is a statutory duty in tort on a person who has control of a motor vehicle and allows someone else to use it on a road or other public place to ensure that that other person is covered by compulsory motor insurance.
- (b) But the Court of Appeal has declined by analogy to extend civil liability for breach of statutory duty to another field where insurance is compulsory, namely employer's liability.
2. At common law and under the Occupier's Liability Act 1957:-
 - (a) There is generally no duty in tort to ensure that someone else is insured; but
 - (b) The duty to check that your independent contractor is competent may, depending on the circumstances, include a subsidiary duty to check that he has public liability insurance; and

- (c) In exceptional (and yet to be defined) circumstances, there may be a free-standing duty to check that your independent contractor has public liability insurance.
3. Never engage as an independent contractor, accept help from, assist or insure anyone performing as "Chaos Encounter".



12KBW Seminar: Cost Effective Resolution – The Annual Defendants
Seminar
Thursday 25th October 2007

**Motor Insurance – RTA Article 75 or MIB
central fund – who pays?
Stephen Worthington QC**

CPD Ref: AVV/CHRW

12 King's Bench Walk, Temple, London EC4Y 7EL,
Tel: 020 7583 0811, Fax: 020 7583 7228, Video Conferencing: 020 7583 4190
E-mail: chambers@12kbw.co.uk, Website: www.12kbw.co.uk, DX 1037 Chancery Lane

12
King's Bench Walk

Contractual Insurer, RTA Insurer, Article 75 Insurer or MIB Central Fund: Who Pays?

Stephen Worthington QC
25th October 2007

12
King's Bench Walk

The Second Directive

- ❑ The Second Directive (84/5/EEC)
 - Requires Member States to make motor insurance compulsory
 - Requires Member States to establish a body to provide compensation to the victims of uninsured or unidentified drivers
 - Permits Member States to exclude the payment of compensation by that body to an injured person who voluntarily entered the vehicle which caused the injury when that person knew that the vehicle was uninsured or stolen

2

The Primary Concept

- ❑ The primary concept which underpins motor insurance is that no innocent person who is injured in a road traffic accident will go uncompensated irrespective of the presence or absence of effective insurance.
- ❑ This result is achieved by a mixture of contractual obligations, the Road Traffic Act 1988 and the Motor Insurers Bureau
- ❑ The rule of thumb is that
 - Where there is an insurer who has taken or would be entitled to take a premium in respect of the offending vehicle then that insurer has to pay any judgment obtained against the driver of that vehicle irrespective of who was driving and how the vehicle came to be involved.
 - Where there is no insurer at all then the judgment is met by the MIB Central Fund.

Cascading Liability

- ❑ The potential liability of an insurer to a victim depends upon his status as an insurer.
- ❑ The liability tree is
 - Contractual insurer
 - Section 151 Road Traffic Act insurer
 - Article 75 insurer
 - MIB Central Fund
- ❑ The potential liability “cascades” from the top of the tree downwards and where there is more than one potential insurer it is the insurer at the highest point in the tree who is liable.

The Contractual Insurer

- ❑ The contractual insurer is at the top of the tree.
- ❑ He meets the liability or pays the judgment in the vast majority of cases.
- ❑ He pays because he is obliged to indemnify the defendant insured because of the terms of the policy
- ❑ The obligation to indemnify may be owed to a number of people or in a number of situations
 - The insured driving the insured vehicle
 - A named driver driving the insured car
 - The insured driving another vehicle under a “driving other cars” (DOC) extension to the policy

5

The Hybrid Contractual Insurer – Section 148 RTA

- ❑ Section 148 of the RTA 1988 provides that certain conditions in a policy “shall be of no effect” in connection with liabilities which are required to be covered under section 145 of the Act.
- ❑ This includes any provision in the policy which entitles the insurer to refuse indemnity because of late notification.
- ❑ Section 148 modifies the insurance contract in relation to liabilities to third party victims but the insurer remains the contractual insurer.
- ❑ Section 148 does not disentitle the insurer to recover from the insured sums which it would not have been obliged to pay apart from section 148 if the policy has a term to that effect.

6

The RTA/Section 151 Insurer

- ❑ This is the statutory insurer
- ❑ The section 151 insurer is the insurer who has provided insurance for the offending vehicle.
- ❑ This insurer is obliged to meet a judgment against the driver irrespective of who that driver may be
 - a spouse or friend not insured under the policy
 - a thief
- ❑ The liability to satisfy the judgment arises where the insurer has delivered a certificate before the judgment. It is irrelevant that the certificate may not have been delivered before the liability (the accident).

7

The Exceptions to Section 151- Procedural

- ❑ Cancellation
 - where the policy has been cancelled before the accident in accordance with the provisions of section 152 (1) (c) and the certificate surrendered to the insurer or a statutory declaration obtained
- ❑ Declaration of Avoidance
 - a declaration that the policy is void or voidable under the procedure in section 152 (2) and (3)
- ❑ No Notice of Proceedings
 - where the insurer has not been provided with notice of the commencement of proceedings before or within 7 days of the issue of proceedings (section 152 (1) (a))
 - less important since *Horton v Sadler* [2006] UKHL 27

8

Exceptions to Section 151 – Section
151 (4) and (8)

- ❑ Travelling in a Stolen Vehicle Knowing it was Stolen - Section 151 (4)
 - “Knew or had reason to believe” is to be interpreted as actual knowledge or deliberately turned a blind eye (*White v White [2001] 1 WLR 481*)
 - The onus of proof is on the insurer
 - In contrast to the provisions of the MIB Uninsured Drivers Agreement (Clause 6 (1) (e) (ii)): knowledge on the part of the injured person that the driver was uninsured does not entitle the insurer to refuse to pay under section 151 (4)

Exceptions to Section 151 – Section
151 (4) and (8) Cont'd

- ❑ Causing or Permitting No Insurance – Section 151 (8)
 - This enables the section 151 insurer to recover the judgment sum from an insured who caused or permitted the uninsured driving
 - This may be the victim
 - The wording of the subsection make it clear that the section 151 insurer can *recover* the sum from the insured/victim
 - in strict terms this is not an exception to section 151 since the insurer is still liable to satisfy the judgment albeit that he can recover it from the victim
 - there is a circuitry/circularity of action

Other Exceptions to Section 151

- ❑ Uninsured type of use
 - the type of use to which the vehicle was being put was not covered by the policy so it does not matter who was driving (insured or unauthorised driver) there is no section 151 liability
 - “social, domestic or pleasure” use does not cover “business” use so that the insurer would not be a section 151 insurer for the insured or anyone else using the vehicle for “business” use.
 - use of the vehicle by a thief for a prolonged criminal activity will not be “social domestic or pleasure” or “business” and the insurer of the stolen vehicle will not be the section 151 insurer (*Keeley v Pashen* [2004] EWCA Civ 1491)

11

Other Exceptions to Section 151 Cont'd

- ❑ Sale of Vehicle
 - if the insured has sold the vehicle then the policy has ceased to have effect so that there is no person insured by it and no liability under section 151 (*Tattersall v Drysdale* [1935] 2 KB 174)
 - this seems obvious even if the section 152 cancellation procedure has not been followed
 - but see *Dodson v Dodson Insurance Services* [2001] 1 Lloyd's Rep 520.

12

MIB – The Basic Liability

- ❑ If the insurer is not a section 151 insurer either because he has obtained a section 152 declaration or because of an exception to section 151 then the insurer has no statutory obligation to meet a judgment
- ❑ At that point the Defendant driver becomes truly “uninsured” because there is no insurer who is contractually or statutorily obliged to pay a judgment obtained against him
- ❑ The potential liability to meet the judgment now devolves upon MIB pursuant to the terms of the Uninsured Drivers Agreement 1999
- ❑ The potential liability of the insurer is no longer contractual or statutory but is governed by the terms of the Articles of Association of MIB and the 1999 Agreement

MIB – The Structure

- ❑ Only members of MIB can underwrite motor insurance – section 145 RTA 1988
- ❑ The 1999 Agreement specifies the terms and conditions upon which MIB will accept liability
- ❑ But MIB's Articles of Association govern the relationship of the insurer members of MIB
- ❑ The member insurers contribute to the MIB's Central Fund in proportion to their premium income from motor insurance
- ❑ The Articles of Association specify the circumstances in which a member insurer will be liable to meet a judgment and those circumstances in which the liability will be met by the Central Fund.

- ❑ The current version of Article 75 came into effect on 8th July 2004 and is retrospective in that it applies to all cases irrespective of the date of the accident
- ❑ An insurer is an Article 75 insurer if, at the time of the accident, it was providing any insurance in respect of the vehicle from the use of which the liability of the defendant arose
- ❑ The insurer is an Article 75 insurer notwithstanding that
 - the insurance was obtained by fraud, misrepresentation, non-disclosure of material facts or mistake
 - the cover has been backdated.
- ❑ Notwithstanding the existence of an Article 75 insurer the liability remains an MIB liability and although the Article 75 insurer handles the claim and pays the judgment out of its own resources it does so under the MIB umbrella and its rights and obligations are governed by the 1999 Agreement.

- ❑ Why would an insurer bother to obtain a section 152 declaration or otherwise seek to “downgrade” its status from section 151/statutory insurer to Article 75 insurer.
- ❑ There are 2 principal reasons
 - an Article 75 insurer has the benefit of the terms and conditions of the 1999 Agreement and, for example, it can seek to avoid liability under clause 6 (1) (e) (ii) - that the victim knew or ought to have known that the driver had no insurance
 - where there are two or more insurers with potential liabilities an insurer who can downgrade its status to Article 75 insurer may be able to escape liability by falling further down the liability tree than another insurer who cannot downgrade

- ❑ Only if there is no insurance at all will the Central Fund be obliged to pay the judgment
- ❑ The Central Fund is the compensator of last resort
- ❑ It is the safety net to which all motor insurers contribute

- ❑ The rule of thumb
- ❑ Where an insurer has taken a premium or provided any insurance in respect of the vehicle involved in the accident then it has a potential liability to meet judgments obtained against the driver of that vehicle
- ❑ Where there is more than one insurer who fulfils the criteria then the liability to meet the judgment will be determined by where each of them is positioned in the liability tree with the insurer highest up the tree being liable



12KBW Seminar: Cost Effective Resolution – The Annual Defendants
Seminar
Thursday 25th October 2007

Cost-Capping Simon Levene

CPD Ref: AVV/CHRW

12 King's Bench Walk, Temple, London EC4Y 7EL,
Tel: 020 7583 0811, Fax: 020 7583 7228, Video Conferencing: 020 7583 4190
E-mail: chambers@12kbw.co.uk, Website: www.12kbw.co.uk, DX 1037 Chancery Lane



Cost Capping

The idea of costs-capping is to enable the courts to control costs from the beginning of the case, not the end. See eg **Griffiths v Solutia UK Ltd**¹:

“So surely, case management powers will allow a Judge in the future to exercise **the power of limiting costs** whether indirectly or even directly so that they are proportionate to the amount involved.”

The Civil Justice Committee recommends that there should be a rebuttable presumption that the parties should have to present costs budgets in cases whose value exceeds £1M, in all group actions and other complex proceedings: that is not the way the courts have seen it. The CJC says its recommendations would help to ensure proportionality.

The Holy Grail

The aim of a costs-capping application is an order in more or less the following terms:

“The base costs of the parties shall not, without the permission of the court, exceed the sum of £... (save that any costs awarded in favour of a party on any interim application shall not count towards the said £...). Either party may apply without notice to increase the figure of £... and any such application shall be supported by a statement addressing the need for the increase and a revised costs estimate calculated to trial.”

There is no “one size fits all” form of order.

¹ [2001] All ER 196

The Statutory Source

Supreme Court Act 1981, section 51

- (1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in –
- (a) the civil division of the Court of Appeal;
 - (b) the High Court; and
 - (c) any county court,
- shall be in the discretion of the court.

...

- (3) The court shall have full power to determine by whom **and to what extent** the costs are to be paid.

Secondary sources

- CPR 3.1(2)(m): the court's general powers of management
Except where these Rules provide otherwise, the court may ... take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.
- Costs Practice Direction: see the Appendix.

When to consider it?

Smart v East Cheshire NHS Trust²

"In my judgment, the court should only consider making a costs cap order in such cases where the applicant shows by evidence that there is a real and substantial risk that without such an order costs will be disproportionately or unreasonably incurred; and that this risk may not be managed by conventional case management and a detailed assessment of costs after a trial, and it is just to make an order. It seems to me that it is unnecessary to ascribe to such a test the general heading of *exceptional circumstances*. I would expect that in the run of ordinary actions, it will be rare for this test to be satisfied but it is impossible to predict all the circumstances in which it may be said to arise."

² [2003] EWHC 2806

A good example...

AB v Leeds Teaching Hospital NHS Trust³

Gage J sitting with the costs judge Master Hurst.

In the opinion of Master Hurst the Woolf Report had envisaged exactly this sort of application, which would become more frequent, if not the norm.

This was group litigation involving about 1,500 claimants. The Claimants sought a Costs Cap of c.£900,000; the Defendants asked the Court to impose a cap of c.£300,000. The Court ordered a Costs Cap of £500,000: this was Ltd to:

- Solicitors' generic costs post 7th February 2003
- Counsel's fees
- Disbursements

The order did not apply to:

- individual file costs
- generic costs before 8th February 2003
- VAT

The principles to come out of **AB**:

The power to make the order

The Court has the power to impose a Costs Cap. This power is found in Practice Direction 2001 (see Appendix). This sets out the steps which the parties must take to keep each other informed about their potential liability in respect of costs. The parties also have a duty to put the Court in possession of enough information to be able to decide what, if any, orders to make about costs and case management.

The level of the Cap

The Court relied heavily on the Group Litigation **Griffiths v Solutia U.K. Ltd**. The Court could exert control over:

- (a) Fee-earners' hourly rates.
- (b) Experts' fees and disbursements.
- (c) Counsel's fees

³ Gage J, [2003 EWHC 1034

In **AB** the parties agreed a solicitors' hourly rate of £155 per hour. There is no doubt that the Court could have fixed its own rate or rates.

Time spent

This was the key issue in dispute. The Claimants' solicitors relied on existing case plans with the Legal Services Commission for past work, and upon a prospective case plan through to trial with an estimated length of trial of six weeks. The Claimant's solicitors emphasised that the prospective costs were not what they would necessarily expect to receive if the Claimants were successful, but represented a figure that took into account most eventualities.

Gage J criticised this approach. He decided that Claimants should seek **the actual figure that they believe is necessary to run the case through to trial**. Both Claimant and Defendant had assumed that irrespective of the Cap, the Court would ultimately scrutinise costs on detailed assessment.

During the hearing Master Hurst said that the purpose of a Costs Cap was to fix a maximum sum that a party could recover at the conclusion of a case. He commented that this would obviate the need for detailed assessment: this seems unlikely, because the cap is no more than a cap: the paying party can still scrutinise the bill.

In **Laybourne v Mills** the Court commented that if the costs cap order contained no mechanism which allowed for it to be altered as the case unfolds or to take into account matters such as conduct or an attempt to settle, it would restrict the Costs Judge's power on assessment. In **Laybourne** DJ Letham took a far more flexible approach to subsequent applications than did Gage J **AB**.

Both parties in **AB** objected to this suggestion. They had assumed that the capped amount would be the **maximum figure** for which the paying party would be liable. The Court made the following orders:

- i. If a party exceeded a Costs Cap, the paying party would not be expected to pay over and above it.
- ii. Parties can return to Court at any time to vary the cost-capping order – for example, if a specific piece of work is envisaged but not actually undertaken. So if a Cost Cap envisaged a trial, but the case settled, the Court could reduce the Cap by the cost of the trial.

During argument the court made it clear that this did not apply to specifically defined work under the scope of the Costs Cap which whilst carried out does not exceed the estimate in the Cap for that specific work. So if the Cap allowed ten hours for a particular task, and the receiving party's solicitor did it five hours, the receiving party was entitled to be paid for all ten hours. The other side of the coin is that if the solicitor had taken 20 hours on the task, she would only be paid for ten hours.

This is not what the Civil Justice Council has recommended:

Where the parties have agreed, or the court has approved, an estimate or budget and/or cap, both the receiving party and the paying party should be entitled to apply for detailed assessment, but only at a costs risk if a significant increase/reduction in the amount claimed is not achieved.

- ii. If unforeseen circumstances arose, the parties could apply to the Court for variation of the Order, though the Court said that such applications should not be made lightly.

Proportionality

Within the Costs Cap a case has to be proportionate: see CPR 1.1(2)(c) –

Dealing with a case justly includes, so far as is practicable ... dealing with the case in ways which are proportionate: (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party.

Group litigation tends to be funded under an LSC contract which allows to the contracted Solicitors and counsel an hourly rate of <£100. If the Claimant succeeds, this is not the rate that he will recover: he will recover the *inter partes* rate; it is difficult to place a publicly funded claimant in a similar position to that of a non-legally aided.

In **Lownds v The Home Office**⁴ the Court held that there were two elements to proportionality:

- Is the global sum proportionate to the amount at stake?
- If the global sum is disproportionate, are the component parts proportionate? Thus, if the costs as a whole are not disproportionate it is still necessary that each item should have been reasonably incurred and the costs for that item should be reasonable.

This raises the risk of a **prospective detailed assessment**. Gage J expressly said in **AB** that he did not intend to go down this route. Nevertheless, the risk remains of prospective detailed assessments dressed up as Cost-Capping applications.

The future

It is clear that cost-capping is not limited to group litigation: any multi-track litigation is potentially a subject for such an order – eg complex clinical negligence claims, or commercial litigation. It is not only Claimant's costs that can be capped: in **Various Ledward Claimants v East Kent Health Authority**⁵ –

The Claimant's solicitors' analysis of the work to be done included gross over-estimates which the court reduced by half.

- Claimant's costs to the end of the trial were capped at £395,000 – *ie*
 - Solicitor: 740 Grade A hours @ £150 an hour
 - Solicitor: 265 Grade B hours @ £135 an hour
 - Solicitor: 745 Grade B hours @ £85 an hour

⁴ (2002 EWCA CIV 365)

⁵ [2003] EWHC 251

- Leading counsel: £50,000 brief fee, daily refresher of £1,750.
- Junior counsel: £25,000 brief fee, daily refresher of £875.
- Defendants' costs were capped at £460,000

For an example of capping in a lower-value case, see **Laybourne v Mills** (District Judge Lethem in Tunbridge Wells):

- Fast-track trial
- £13,000 claimed.
- Cost estimate at allocation: £22,000.
- Cap imposed on both parties.

The Courts have yet to give definitive guidance on:

- The Court's power to determine prospectively the rate of return on an *inter partes* basis
- To assess the level of uplift pursuant to a Conditional Fee Agreement.
- Experts' fees.

Some practical considerations

- 1 See *eg Smart* below:
 - a when an application was made it had to be supported by evidence showing a prime facie case that the above conditions could be satisfied;
 - b the allocation and listing questionnaires would have attached estimates of the likely overall costs which should give a good guide;
 - c the court should be able to deal with an application at a comparatively short hearing; and
 - d the benefit of the doubt in respect of the reasonableness of prospective costs should be resolved in favour of the party being capped. The order should also include a provision for uplift in certain circumstances.
- 2 When drawing up case plans it is essential for all parties to reflect accurately the time that they intend, and expect, to take.
- 3 They should be able to justify as proportionate not only the **overall** time they propose to expend on the litigation, the time they propose to spend on **specific items**.

- 4 Counsel should become involved: the tasks they will be doing, their hourly rates and the number of hours they are likely to put in will all become subject to similar scrutiny.
- 5 Experts' fees will certainly be subject to prospective scrutiny, rather leaving them to detailed assessment.
- 6 Caps only apply to the amount the paying party will have to pay. They do not affect the amount of work that a party may actually do. A party can apparently spend what it likes, whether or not it is recoverable. It is therefore likely that a corporate client can get round a cap by doing the work in-house.

Case list

Giambrone v JMC Holidays Ltd⁶

Lownds v The Home Office⁷

Griffiths v Solutia UK Ltd⁸

Where an order *has* been made

- Various Ledward Claimants v East Kent Health Authority⁹
- AB v Leeds Teaching Hospital NHS Trust¹⁰
- King v Telegraph Group Ltd¹¹
- Sheppard v Essex Strategic Health Authority¹²

It had been appropriate to make a costs capping order in respect of the claimant's costs of a clinical negligence action because there was a real risk that, without control, the already substantial costs would become disproportionate or unreasonable.

The appellants (S) appealed against an order that there be a costs cap of their clinical negligence action against the respondent health authority (E). S were twins that had been born with hydrocephalus and shunts were fitted in each child to drain the excess fluid from the brain. S claimed that as a result of E's negligent management of those

⁶ (2002) EWHC 2923 (QB)

⁷ (2002) EWCA Civ 365

⁸ [2001] All ER 196

⁹ [2003] EWHC 251

¹⁰ Gage J, [2003] EWHC 1034

¹¹ [2004] EWCA Civ 613

¹² 13th May 2005

shunts S had both suffered substantial physical damage. S's estimate of total costs and disbursements in respect of their clinical negligence action was just over £515,000. E's estimate was approximately £162,000, and E estimated that S's costs should in total be in the region of £240,000. A master capped S's costs of the action, with the levels to be determined by a costs judge. S argued that the master placed too great a reliance upon the differences in the parties' estimates of costs, and submitted that there was very good reason why the figures were so different, in particular, S argued that E had grossly under-estimated the costs of preparing the case for trial.

HELD: The courts were moving towards a system of pre-emptive strikes in order to avoid the costs of litigation spiralling out of control and becoming unreasonable or disproportionate. It was far better for the court to attempt to control and budget for costs where appropriate, than to allow costs to be incurred and then submitted to detailed assessment after the event. ***The idea of a costs capping order was to exercise some kind of control, even over the most experienced and respected firm of solicitors.*** Any solicitor had to act with the best interests of their client at heart. With the best intentions there was a risk that in certain cases, without some kind of control by the court, there may be an unreasonable or disproportionate expenditure of limited resources. It was significant in the instant case that both sides were publicly funded. Public funds were scarce and it was the duty of the court to play its part in ensuring they were expended properly and effectively. The estimate of S's costs was substantial for an action in clinical negligence, even with two claimants. On the facts it was appropriate for the master to have made the capping order since there was a real risk that, without control, the already substantial costs would become disproportionate or unreasonable. The most effective way of exercising control was by having a budget imposed by an experienced costs judge.

Where an order has *not* been made

- Weir v Secretary of State for Transport¹³

Given that the applicant members of the Railtrack Private Shareholders Action Group had a private interest in the outcome of their proceedings against the Secretary of State for Transport, it was not appropriate to grant a costs capping order.

The claimant (W) applied for an order capping at £1.35 million their potential liability for the defendants' costs up to and including the trial on liability. W, a member of the Railtrack Private Shareholders Action Group, had commenced proceedings against the secretary of state alleging misfeasance in public office and breach of the European Convention on Human Rights 1950 Art.1. The secretary of state was prepared to cap his costs at £2.25 million if such sum was paid into court or a solicitor's account. The secretary of state argued that on the authorities it was clear that costs capping orders should not be made in private law cases and as regards the court's discretion such orders were only likely to be made in a narrow band of circumstances such as where a party's costs were going to be incurred unreasonably or disproportionately and the only sanctions available were not sufficient to meet the problem.

HELD: Certain conditions had to be fulfilled to warrant the making of a costs capping order, R (on the application of Corner House Research) v Secretary of State for Trade and Industry (2005) EWCA Civ 192, Independent, March 4, 2005 applied. One of those was that the applicant should have no private interest in the outcome of the case. In the instant case the relief sought by W was compensation indicating that W had a private interest in the outcome. The instant case was not one where the costs had spiralled out of control and even if they were the costs could be reduced when assessed. The court was not able to exercise its discretion in W's favour.

- Smart v East Cheshire NHS Trust¹⁴

The court should consider making a costs cap order where the applicant showed by evidence that: (i) there was a real and substantial

¹³ Ch D (Lindsay J) 20th April 2005

¹⁴ [2003] EWHC 2806

risk that without such an order costs would be disproportionately or unreasonably incurred; (ii) the risk could not be managed by conventional case management and a detailed assessment of costs after trial; and (iii) it was just to make such an order. ***It was very unlikely that it would be appropriate for the court to adopt a practice of capping costs in the majority of clinical negligence cases.*** As ***S's solicitors were experienced in this field, there was not a real and substantial risk that costs would be disproportionately or unreasonably incurred.*** But see **Sheppard** above.

- **Petursson v Hutchinson 3G UK Ltd**¹⁵
- **Knight v Beyond Properties Ltd**¹⁶

The principles relating to costs capping orders laid down in **King v Telegraph Group Ltd** were not applicable to all litigation. The court would only consider making a costs capping order where it was established on evidence that ***there was a real risk of disproportionate or unreasonable costs being incurred*** and that risk could not satisfactorily be provided for by more conventional means, such as the usual costs assessment after the trial. **Smart** was followed. It was the costs judge's role to filter out the sort of extravagant costs that had in some cases led to the making of a costs capping order. In the instant case, the fact that there was a CFA with a large mark-up, with no ATE cover, was not in itself enough to justify a costs capping order. The evidence showed clear suggestions of potentially extravagant costs expenditure, but that could be dealt with in the usual way by post-trial costs assessment.

- **Henry v BBC**¹⁷

A party's solicitors were entitled to be informed about the extent of the opposing party's legal costs insurance cover. They were also entitled to be informed if the estimated costs of the action had risen substantially, and if they encountered difficulty in obtaining that information they should make an application pursuant to Practice

¹⁵ [2004] EWHC 2609

¹⁶ [2006] EWHC 1242

¹⁷ [2006] 1 All ER154

Direction: (Parts 43 - 48): Schedule of Costs Precedents s.6.3 for the court to order the opposing party to file an estimate.

The applicant (BBC) applied for a costs capping order in libel proceedings brought against it by the respondent (H). H had retained solicitors under a conditional fee agreement (CFA) accompanied by legal costs insurance (LCI). The success fee in the CFA, although not disclosed, had been estimated at 100 per cent. The parties' solicitors had given estimates of their costs in their allocation questionnaires. H's solicitors had refused the BBC's request for details of the conditions and level of cover of the LCI policy. The policy contained certain exemptions that made it very likely that the insurer would be able to disclaim liability for the BBC's costs if the BBC were to succeed in its defence of justification. H's solicitors had initially refused the BBC's requests for a revised costs estimate. Immediately prior to the instant application, H's solicitors served the BBC with a revised costs estimate, which had increased significantly. The BBC's predicament was that if it lost it would be liable for H's costs which, inclusive of the success fee, would total in the region of £1.6 million, whereas if it successfully defended the claim there was doubt that it would be able to claim under the LCI policy, which in any event provided totally inadequate cover, and it would struggle to recover from H herself, whose assets were not enough to cover the costs. The BBC, although admitting that its application was being made at a very late stage, argued that the delay was as a result of H's conduct in not disclosing information about the escalating costs and the terms of the LCI. H submitted that the application was being made too late in the course of the litigation, and that it would be unfair to cap costs from that point on, given that part of the rationale for the costs capping regime was to allow the capped party to plan ahead and allocate resources appropriately in light of the cap. H contended that there had not been any deception regarding the terms of the LCI cover. H further argued that it would be impracticable for a judge sitting alone, without advice

or assistance from a costs judge, to determine the right figure for the cap.

HELD: On the face of it, the facts of the instant case indicated that a costs capping order was required. Where costs were high and a CFA with a substantial success fee was in place, the court was likely to be willing to intervene with a costs capping order. However, a court could not impose such an order of its own motion. As was clear from Practice Direction: (Parts 43 - 48): Schedule of Costs Precedents s.6.1, s.6.3 and s.6.6 it was for the parties to keep themselves informed of their opponents' estimated costs and if necessary make an application to the court for an order that an estimate be provided. However, no such application had been made in the instant case. The BBC had not been informed of H's increased costs until a late stage. The BBC could and should have been informed much earlier of the escalating costs, particularly in light of the existence of a CFA, which could have potentially doubled its costs exposure. The BBC had not been informed about the terms of the LCI policy. That should not have happened: BBC had a legitimate interest in knowing the extent of the protection provided under the policy. However, although the BBC had found itself in a situation where if it successfully defended the claim it was unlikely to recover all of its costs, yet if it lost the claim it would incur substantial costs, a costs capping order could not be imposed at such a late stage in the litigation. The trial was only days away. ***A costs capping order should operate prospectively, not retrospectively***, King v Telegraph Group Ltd (2004) EWCA Civ 613 , (2005) 1 WLR 2282 and Weir v Secretary of State for Transport applied. The imposition of ***a costs capping order so close to trial would effectively penalise H's solicitors, which was not the purpose of a costs capping order***. Furthermore, the judge was unable to determine, without the assistance of a costs judge, the amount of brief fees, the charging rates and how much work was reasonable and proportionate. Such an exercise was more suitable for a costs judge or at least a judge sitting with a costs judge.

Appendix
Costs Practice Direction
Supplementing Parts 43 To 48 Of The Civil Procedure Rules

Section 6 Estimates Of Costs

6.1 This section sets out certain steps which parties and their legal representatives must take in order to keep the parties informed about their potential liability in respect of costs and in order to assist the court to decide what, if any, order to make about costs and about case management.

6.2 (1) In this section an 'estimate of costs' means –

- (a) an estimate of base costs (including disbursements) already incurred; and
- (b) an estimate of base costs (including disbursements) to be incurred, which a party intends to seek to recover from any other party under an order for costs if he is successful in the case.

*("Base costs" are defined in paragraph 2.2 of this Practice Direction.
"Base costs" means costs excluding any CFA uplift.)*

(2) A party who intends to recover an additional liability (defined in rule 43.2) need not reveal the amount of that liability in the estimate.

6.3 The court may at any stage in a case order any party to file an estimate of costs and to serve copies of the estimate on all other parties. The court may direct that the estimate be prepared in such a way as to demonstrate the likely effects of giving or not giving a particular case management direction which the court is considering, for example a direction for a split trial or for the trial of a preliminary issue. The court may specify a time limit for filing and serving the estimate. However, if no time limit is specified the estimate should be filed and served within 28 days of the date of the order.

6.4 (1) When –

- (a) a party to a claim which is outside the financial scope of the small claims track files an allocation questionnaire; or
- (b) a party to a claim which is being dealt with on the fast track or the multi track, or under Part 8, files a pre-trial check list (listing questionnaire),

he must also file an estimate of costs and serve a copy of it on every other party, unless the court otherwise directs. Where a party is represented, the legal representative must in addition serve an estimate on the party he represents.

- (2) Where a party is required to file and serve a new estimate of costs in accordance with Rule 44.15(3), if that party is represented the legal representative must in addition serve the new estimate on the party he represents.
- (3) This paragraph does not apply to litigants in person.

6.5 An estimate of costs should be substantially in the form illustrated in Precedent H in the Schedule of Costs Precedents annexed to the Practice Direction.

6.5A (1) If there is a difference of 20% or more between the base costs claimed by a receiving party on detailed assessment and the costs shown in an estimate of costs filed by that party, the receiving party must provide a statement of the reasons for the difference with his bill of costs.

- (2) If a paying party –
 - (a) claims that he reasonably relied on an estimate of costs filed by a receiving party; or
 - (b) wishes to rely upon the costs shown in the estimate in order to dispute the reasonableness or proportionality of the costs claimed,

the paying party must serve a statement setting out his case in this regard in his points of dispute.

(‘Relevant person’ is defined in paragraph 32.10(1) of the Costs Practice Direction)

- 6.6 (1) On an assessment of the costs of a party, the court may have regard to any estimate previously filed by that party, or by any other party in the same proceedings. Such an estimate may be taken into account as a factor among others, when assessing the reasonableness and proportionality of any costs claimed.
- (2) In particular, where –
- (a) there is a difference of 20% or more between the base costs claimed by a receiving party and the costs shown in an estimate of costs filed by that party; and
 - (b) it appears to the court that –
 - (i) the receiving party has not provided a satisfactory explanation for that difference; or
 - (ii) the paying party reasonably relied on the estimate of costs;
- the court may regard the difference between the costs claimed and the costs shown in the estimate as evidence that the costs claimed are unreasonable or disproportionate.

Simon Levene
12 King's Bench Walk
Temple
London
EC4Y 7EL

12
King's Bench Walk

Costs Capping

Simon Levene
25th October 2007



“The base costs of the parties shall not, without the permission of the court, exceed the sum of £... (save that any costs awarded in favour of a party on any interim application shall not count towards the said £...). Either party may apply without notice to increase the figure of £... and any such application shall be supported by a statement addressing the need for the increase and a revised costs estimate calculated to trial.”

“So surely, case management powers will allow a judge in the future to exercise **the power of limiting costs** whether indirectly or even directly so that they are proportionate to the amount involved.”

Griffiths v Solutia UK Ltd
2001

Where does the power come from?

Supreme Court Act 1981, section 51

- (1) Subject to the provisions of this or any other enactment and to rules of court, the costs of _____ and incidental to all proceedings in the civil _____ division of the Court of Appeal; the High Court; _____ and any County Court, shall be in the discretion _____ of the court...
- (3) The court shall have full power to determine by _____ whom **and to what extent** the costs are to be paid.

5

Where does the power come from?

CPR 3.1(2)(m): the court's general powers of management

Except where these Rules provide otherwise, the court may ... take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.

6

Where does the power come from?

- ❑ Costs Practice Direction 2011 (see Appendix to the lecture notes).
 - This sets out the steps which the parties must take to keep each other informed about their potential liability in respect of costs.
 - The parties also have a duty to put the Court in possession of enough information to be able to decide what orders to make about costs.

Proportionality

There are two elements to proportionality:

- ❑ Is the global sum proportionate to the amount at stake?
- ❑ If the global sum is disproportionate, are the component parts proportionate? Thus, if the costs as a whole are not disproportionate it is still necessary that each item should have been reasonably incurred and the costs for that item should be reasonable.

Lownds v The Home Office 2002

District Judge Lethem of Tunbridge Wells County Court



9

Laybourne v Mills (2003)

- Value of claim: £13,000
- Claimant's cost estimate at allocation = £22,000
- Should the Court do nothing until detailed assessment?
"Issues of proportionality might be highly relevant in lower-value multi-track claims. A case can be made out for control on all major and significant litigation. Generally, the costs estimate in the allocation questionnaire will suggest whether or not the case is one where the court ought to consider a costs capping order."

10

But there must be flexibility:

- ❑ “If the costs cap order contained no mechanism which allowed for it to be altered as the case unfolded or to take into account matters such as conduct or an attempt to settle, it would restrict the Costs Judge’s power on assessment.”

- ❑ The court’s case management powers allow it to “take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.” [CPR 3.1(2)(m)]
- ❑ The court shall have full power to determine by whom **and to what extent** the costs are to be paid. [SCA1981]

The Overriding Objective

Dealing with a case justly includes:

- saving expense
- dealing with the case in ways which are proportionate to the amount of money involved... [and] to the financial position of each party...

13

When should costs be capped?



14

“In my judgment, the court should only consider making a costs cap order in such cases where the applicant shows by evidence that there is a **real and substantial risk that without such an order costs will be disproportionately or unreasonably incurred**; and that **this risk may not be managed by conventional case management and a detailed assessment of costs after a trial**, and it is just to make an order. It seems to me that it is **unnecessary** to ascribe to such a test the general heading of **exceptional circumstances**. I would expect that in the run of ordinary actions, it will be rare for this test to be satisfied but it is impossible to predict all the circumstances in which it may be said to arise.”

Smart v East Cheshire NHS Trust 2003

15

AB v Leeds Teaching Hospital NHS Trust



16

- Gage J and Master Hurst
- Master Hurst: the Woolf Report had envisaged exactly this sort of application, which would become more frequent, if not the norm.
- This was group litigation involving about 1,500 claimants.
- The Claimants sought a Costs Cap of c.£900,000.
- The Defendants asked the Court to impose a cap of c.£300,000.
- The Court imposed a cap of ...

£500,000 to cover:

- Solicitors' generic costs post 7th February 2003
- Counsel's fees
- Disbursements

The order did not apply to:

- individual file costs
- generic costs before 8th February 2003
- VAT

AB v Leeds

The power to make the order

- ❑ The Court has the power to impose a Costs Cap.
- ❑ This power is found in Practice Direction 2001.
This sets out the steps which the parties must take to keep each other informed about their potential liability in respect of costs. The parties also have a duty to put the Court in possession of enough information to be able to decide what, if any, orders to make about costs and case management.

AB v Leeds

The level of the cap

- The level of the Cap**
- ❑ The Court can control:
 - Fee-earners' hourly rates.
 - Experts' fees and disbursements.
 - Counsel's fees
 - ❑ In **AB** the parties agreed a solicitors' hourly rate of £155 per hour. There is no doubt that the Court could have fixed its own rate or rates.

AB v Leeds Cap v Detailed Assessment

- ❑ During the hearing Master Hurst said that the purpose of a Costs Cap was **to fix a maximum sum that a party could recover at the conclusion of a case**. He commented that this would obviate the need for detailed assessment.
- ❑ This seems unlikely, because the cap is no more than a cap: the paying party can still scrutinise the bill.
- ❑ This raises the risk of a **prospective detailed assessment**. Gage J expressly said that he did not intend to go down this route. Nevertheless, the risk remains of prospective detailed assessments dressed up as Cost-Capping applications.

21

AB v Leeds Time spent on the case

- ❑ **Time spent on the case** was the key issue in dispute.
- ❑ The Claimants' solicitors relied on existing case plans with the Legal Services Commission for past work, and upon a prospective case plan through to trial with an estimated length of trial of six weeks. The Claimant's solicitors emphasised that the prospective costs were not what they would necessarily expect to receive if the Claimants were successful, but represented a figure that took into account most eventualities.

22

AB v Leeds

Time spent on the case

Gage J criticised this approach. He decided that Claimants should seek **the actual figure that they believe is necessary to run the case through to trial**. Both Claimant and Defendant had assumed that irrespective of the Cap, the Court would ultimately scrutinise costs on detailed assessment.

AB v Leeds

Variation of the order

- The Order can be varied at any time
 - If a specific piece of work is envisaged but not actually undertaken - eg settlement before trial.
 - If unforeseen circumstances arise – though Gage J said that such applications should not be made lightly.

AB v Leeds Warning note

- During argument the court made it clear that variation did not apply to specifically defined work under the scope of the Costs Cap which whilst carried out does not exceed the estimate in the Cap for that specific work. So **if the Cap allowed ten hours for a particular task, and the receiving party's solicitor did it five hours, the receiving party was entitled to be paid for all ten hours.** The other side of the coin is that if the solicitor had taken 20 hours on the task, she would only be paid for ten hours.

This is not what the Civil Justice Council has recommended:

*Where the parties have agreed, or the court has approved, an estimate or budget and/or cap, **both the receiving party and the paying party should be entitled to apply for detailed assessment**, but only at a costs risk if a significant increase/reduction in the amount claimed is not achieved.*

The Ledward litigation

- ❑ The Claimant's solicitor grossly over-estimated the work to be done, which the court reduced by half.
- ❑ Claimant's costs to the end of the trial were capped at **£395,000** – ie
 - Solicitor: 740 Grade A hours @ £150 an hour
 - Solicitor: 265 Grade B hours @ £135 an hour
 - Solicitor: 745 Grade B hours @ £85 an hour
 - Leading counsel: £50,000 brief fee + £1,750/day.
 - Junior counsel: £25,000 brief fee + £875/day.
- ❑ Defendants' costs were capped at **£460,000**

Various Ledward Claimants v East Kent HA 2003

27

Practical points

- ❑ An application must be supported by evidence showing a prime facie case that the above conditions could be satisfied;
- ❑ Allocation and listing questionnaires should give estimates of the likely overall costs which should give a good guide;
- ❑ The court should be able to deal with an application at a comparatively short hearing; and
- ❑ The benefit of the doubt in respect of the reasonableness of prospective costs should be resolved in favour of the party being capped. The order should also include a provision for uplift in certain circumstances.

28

- ❑ When drawing up case plans it is essential for all parties to reflect accurately the time that they intend, and expect, to take.
- ❑ Parties should be able to justify as proportionate not only the **overall** time they propose to expend on the litigation, the time they propose to spend on **specific items**.
- ❑ Counsel should become involved: the tasks they will be doing, their hourly rates and the number of hours they are likely to put in will all become subject to similar scrutiny.

- ❑ Experts' fees will certainly be subject to prospective scrutiny, rather leaving them to detailed assessment.
- ❑ Caps only apply to the amount the paying party will have to pay. They do not affect the amount of work that a party may actually do. A party can apparently spend what it likes, whether or not it is recoverable. Corporate clients can get round a cap by doing some of the work in-house.

- ❑ “The idea of a costs capping order is to exercise some kind of control, even over the most experienced and respected firm of solicitors.” [Hallett J in Sheppard, 2005]
- ❑ “It is very unlikely that it would be appropriate for the court to adopt a practice of capping costs in the majority of clinical negligence cases. As S’s solicitors are experienced in this field, there is not a real and substantial risk that costs would be disproportionately or unreasonably incurred.”

- ❑ “The court would only consider making a costs capping order where it was established on evidence that ***there was a real risk of disproportionate or unreasonable costs being incurred.***” Knight v Beyond Properties Ltd [2006]
- ❑ A costs capping order should operate ***prospectively, not retrospectively.***... The imposition of a costs capping order so close to trial [one day before] would effectively penalise H’s solicitors, which was not the purpose of a costs capping order.” Henry v BBC [2006]

12
Brighton's White



33