Civil Procedure Rules

A Brief Update

2005

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21-ix-MMV

1.	CPR Part 14.1(5)	Application to withdraw an Admission
2.	CPR Part 21	Approval hearings under RTA Predictive Costs Scheme
3.	CPR Part 25	Conditional Interim Payments
4.	CPR Part 35	Consequence of instructing a new Expert, Breaching Expert Guidelines & Evidence preferred on 'literature'.
5.	CPR Part 36	Pre-Issue offers & Tactical offers.
6.	CPR Part 41	Periodical Payment Orders & Lump Sum Payments
7.	CPR Part 44	Payments In & Costs following Trial on Liability alone.
8.	UPCOMING	Changes to CFAs & CCFAs.

1. **CPR 14.1**

(5) The court may allow a party to amend or withdraw an admission.
(Rule 3.1(3) provides that the court may attach conditions when it makes an order.)

Another case to add to: Gale, Sollit, Browning, Mallia, Flaviis, Beckett, Braybook, Thorp, Lenton, Ali, Hamilton, Fanning, Walsh et al.

Sowerby (below) contradicts Salter V McCarthy [2002] (unreported) previous authority holding CPR Part 14 did not apply to pre-action admissions. In Salter it was held that paragraph 3.9 of the Pre-action protocol was binding (claim for less than £15,000?).

SO to:

Sowerby V Charlton [2005] EWHC 949 High Court, QBD Playford J, QC.

In April 2003, the Claimant visited a south London premises whilst under the influence of alcohol. The ground floor was higher than the pavement level, and had a number of steps leading up to them, with a basement premises below. There was a rail guarding only one side of the steps, the other being open. A pediment (an architectural feature to the uninitiated) ran up each side of the steps, and at the top main entrance level formed a raised lip of 1½ to 2 inches. The Claimant fell 8 feet off the platform level, over the pediment on the open side, and sustained catastrophic injuries. She was rendered tetraplegic.

A letter before action was sent in October 2003, eliciting the standard Insurer request for details in November 2003. Correspondence ensued, with C requesting a decision on liability. In April 2004, D responded saying their client was awaiting its re-insurers views on liability.

In May 2004, a letter marked "Without Prejudice" was sent stating:

> "*Having investigated this claim the Defendant is prepared to admit a breach of duty. However, we are instructed to seek contributory negligence of 50%*".

C responded promptly requesting an immediate interim payment of £150,000 and requesting confirmation of D's liability positioning open correspondence, and advising that instructions would be taken on proposed contributory negligence of 50%. This was subsequently rejected by the Claimant in June 2004, when D was again requested to

admit openly their breach of duty. D resent their earlier letter, this time deleting all references to it being "Without Prejudice". The relevant admission thus stated '*Having investigated this claim the Defendant is prepared to admit a breach of duty*.'

Proceedings were issued later in 2004, and the admission was pleaded. The Defence in September 2004, sought to resile from the admission and put primary liability in issue. Its reason for such was that "*the admission was made on an incomplete understanding of the relevant facts*". A statement from D's solicitor was filed in support. It conceded,

> "*The Defendant did undertake investigations prior to the admission. This investigations resulted in a conclusion, which I reached with my client that liability should be admitted, but that the Claimant's drunken condition had played a large part in the accident….*"

But sought to explain the change of heart by "*The reason why the …admission … has been withdrawn is that I have consulted counsel who is experienced in catastrophic injury claims. He advised me that the circumstances in this case do not justify the concessionary approach, which I had already taken with the Claimant*".

(Did he advise to check your indemnity whilst you are at it?)

Master Tennant refused the application to resile, D appealed.

HELD (dismissing the appeal – note 'future conduct' and 'public interest' point**):**

- CPR Part 14 could apply to admissions given before the commencement of litigation [thereby contradicting Salter].
- His Lordship applied the usual tests [good faith, prejudice, merits, etc] identifying the factors for consideration, and expressed some concern with the requirement that "*the application must be made in good faith*".

Whilst accepting that neither side was acting in bad faith at the time of the application, he said, one:

> " *must **have some regard, I think, to the future**. Thorpe LJ cautioned against what he termed "strategic manoeuvring" in Gale …… I have to say , as I made clear to counsel, that I certainly cannot rule out the possibility that what may be seen as strategic manoeuvring could occur in the future.*

There is no telling whose mind may in the future come to bear on the problem, and I would have thought …….that in a case of this kind it would be very likely that at some stage, if the matter proceeds on primary liability, the defendant's insurers might consider it in their best interests to try and achieve a settlement. So they would then go to the negotiating table in a very much better position than they would go now, having conceded primary liability.

It seems to me a very different thing to go to the negotiating table with primary liability in a case such as this entirely open, rather than going there when you have conceded primary liability and are arguing for contributory negligence up to 50/50……I can well see that this might be perceived as strategic manoeuvring should this ever occur in the future……Anyway, having made that point, I think the issue of good faith in a case such as this is something that might cause some concern, but I do not feel I can take it any further. It is a factor"

The Judge pointed out:

- Counsel was asked to advise on primary liability, after the decision had been taken to concede primary liability.
- The admission was not a mistake. It was not based on an incomplete understanding of the relevant facts (*ie the reason given*) or otherwise mistaken in any other way.
- It was a fully informed decision made by Solicitors advising their client, who also took into account the views of their re-insurers.

When considering issues of "Prejudice" His Lordship highlighted:

- to <u>the Claimant</u> was a very seriously injured young woman, who would suffer disappointment, and be prevented from proceeding with an application for an interim payment

[Correct if just looking at CPR 25.7(1)(a), but see also CPR 25.7(1)(c) and CPR 25.7(5) where an admission is not required for provision of an interim payment]

- She would also face a trial on primary liability, which was entirely different from the limited trial resulting solely form the Defendant's allegations of contributory negligence. [*This would appear a significant factor – my emphasis*].

- Prejudice to the Defendant this raised questions of the Claimant's prospects of success on primary liability. It appeared to the Judge that she would succeed in establishing liability, hence t here was no prejudice to the Defendant.

Another consideration was the Public Interest. His Lordship concluded that "*it could be seen as unjust, and evidence of a system not working should the Defendant, simply because someone had taken a different view on liability, be allowed to withdraw a clear admission … to the prejudice of the Claimant*."

[this could prove an interesting development].

2. CPR Part 21.10(3) Amendment in force from 1st April 2005.

"In proceedings to which Section II of CPR Part 45 applies (*RTA Predictive Costs Scheme*) the Court shall not make an order for detailed assessment of the costs payable to the child or patient, but shall assess the costs in the manner set out in that section".

Note though Court Fees and Counsel's fees may be recovered:

CPR Part 45.10(2) "..where they are necessarily incurred by reason of one or more of the claimants being a child or patient as defined in CPR Part 21 – (i) fees payable for instructing Counsel; or (ii) court fees payable on an application to the Court."

3. CPR Part 25.1 Interim Remedies

(1) The court may grant the following interim remedies—…….

(k) an order (referred to as an order **for interim payment**) under rule 25.6 for payment by a defendant on account of any damages, debt or other sum (except costs) which the court may hold the defendant liable to pay;

Can a Defendant seek conditions on payment of an Interim payment for Care managers, and who does a Care Manager owe his/her duty to?

Wright V Sullivan [2005] EWCA Civ 656 CA (Civil Division) 11th July 2005. (Brooke, Dyson and Lloyd LLJ).

The Claimant pedestrian was knocked down by the Defendant's car, suffering a very severe concussive head injury, causing brain damage with physical and mental symptoms. She had pre-existing symptoms that may have been aggravated by the accident. Although capable of all acts of daily living, she required constant daily

supervision and care. The Court of Protection administered her affairs, and any assessment of damages was going to be difficult. D conceded liability 70%.

- C applied for an interim payment under CPR Part 25.7(1)(k), it being agreed by the parties that a report from a clinical case manager was desirable. The parties also managed to identify an appropriate Occupational Therapist (OT) to act as clinical case manager.
- However, pre-application D proposed that OT should be jointly instructed, and payment of the interim payment should be deferred until after the report was ready. C refused.
- At the hearing, D contended that any order for an interim payment should be made conditional on OT receiving joint instructions, and OT should report to both parties jointly. C objected.
- The interim payment was ordered with the Judge refusing the conditions sought. However he did direct that any witness statement from OT for the disposal hearing should recite "that although a witness of fact, she should treat herself as owing the same duties to the Court in making her statement, as if she were an expert reporting to the Court".

- D appealed against the refusal to impose conditions of joint instruction, and argued that both parties representatives and their experts should be at liberty to communicate with the Case Manager on issues relevant to the claim, with the substance of all communications on relevant issues between representatives of either party, their experts and the Case Manager, being recorded and disclosed immediately [D wanted waiver of privilege].

- C cross-appealed against the recital imposed on any witness statement from OT.

Court of Appeal HELD:

Dismissing D's Appeal: It referred to the principles and guidelines for case management issued by the British Association of Brain Injury Case Managers in January 2005, and explained the role of the Case Manager as emerged in modern times.

- D's submissions were impossible to accept, as it seemed inevitable that a Case Manager "*should owe her duties to her patient alone*". She had to win her patient's trust and co-operation with what was being proposed, and while in her interests to receive a flow of suggestions from experts instructed by the parties, "*she must ultimately make decisions n the best interests of the patient and not be beholden to two different masters*".

- Thus any communication a case manager may have with C's expert witnesses, whose dominant purpose is not one that attracts legal professional privilege "*will be disclosed as a matter of course……But if the clinical case manager considers that it is in her client's interests that she should attend a conference with legal advisers at which advice is being sought, then the privilege is not hers to waive, and I do not consider that the Court would have any power to direct such waiver*"

Allowing C's cross appeal: The role of OT if called to give evidence, is clearly one of a witness of fact, directed at explaining what she did and why she did it.

She will not be giving expert opinion evidence, and thus the regime of CPR Part 35 will not apply to her evidence.

4. CPR Part 35 – Instructing a new expert

CPR Part 35.4 Court's power to restrict expert evidence

(1) No party may call an expert or put in evidence an expert's report without the court's permission.

(2) **When a party applies for permission under this rule he must identify—**

(a) **the field** in which he wishes to rely on expert evidence; **and**

(b) **where practicable the expert** in that field on whose evidence he wishes to rely.

(3) If permission is granted under this rule it shall be in relation **only to the expert named or the field** identified under paragraph (2).

Hajigeorgiou V Vasiliou [2005] EWCA Civ 236 CA (Civil Division)

10th March 2005 (Brooke LJ, Dyson and Gage LLJ)

H appealed against the first instance decision of a judge giving directions for expert evidence to assess damages it was liable to pay to V.

- By an order made at a case management conference (whose terms were agreed by Counsel) the parties were granted "permission, if so advised, *to instruct one expert each in the specialism of* restaurant valuation and profitability". [Hence the field but not the experts were identified in the order]

H foreshadowed the order and identified an expert, W. Once the order was made, W made an inspection. H subsequently decided not to rely on his report and sought access for a second expert to inspect the premises.

The judge decided H needed permission to call the second expert and rely on his report, and would give permission to H under CPR Part 35.4, only on condition W's report was disclosed to V. (See Beck V Ministry of Defence [2003] EWCA Civ 1043.)

H submitted the first order gave permission to both parties to instruct a relevant expert, and did not give permission only to instruct W. V contended it was plainly intended by the order that H be given permission to rely only on the evidence of W, and the order did not envisage a succession of experts. So once H had implemented the order by instructing W, he required permission for any substitute expert.

Court of Appeal **HELD**:

- The judge seemed to have construed the order as giving H permission to rely on the evidence of W, but the order plainly identified the experts only by their field of expertise. There was no accidental slip or error in the order.

- Accordingly, the terms of the order did not of themselves require permission to rely on the second expert's evidence.

- Further, the court did not have power to give permission for the "instruction" of experts. CPR part 35.4 did not refer to "instruction" of experts. Thus the words in the order "*permission, if so advised, to instruct one expert*" should be construed as meaning "*permission, if so advised, to call and put in evidence a report from one expert*".

- Therefore H did not need the permission of the court to rely on the evidence of the second expert.

(*Obiter*) If H did need permission, the judge was right to impose the condition that he did, Beck v Ministry of Defence Times [2003] July 21, 2003 explained.

- In imposing this condition the Court is not abrogating legal professional privilege, it is merely saying 'if a party seeks the Court's permission to rely on a substitute expert, it will be required to waive privilege, in the first expert's report as a condition of being permitted to do so."

- Also the condition of disclosure does not relate only to the first expert's final report, but also a draft report containing the substance of his or her opinion.

CPR Part 35 PD - Breach of Expert Guidelines

Code of Guidance on Expert Evidence:

A Guide for experts and those instructing them for the purpose of court proceedings

Part I— Experts 35.20 Payment

(9) Payments contingent upon the nature of the expert evidence given in legal proceedings, or upon the outcome of a case, must not be offered or accepted. To do so would contravene the expert's overriding duty to the court.

Davis V Stena Line Limited [2005] EWHC 420 17th March 2005,
High Court Q.B. Division, (Forbes J.)

C brought a fatal accident claim alleging negligence, following the death of her husband from drowning, when he went overboard in rough seas, unobserved.

At the start of the trial, D submitted that C's expert evidence should be excluded because most of the work carried out by the experts had been on a contingency fee basis. However, before signing their reports the arrangements were changed to a deferred payment basis.

His Lordship accepted that the work of the experts had been carried out under contingency fee arrangements contrary to the Code of Guidance on Expert Evidence, annexed to the Practice Direction for CPR Part 35, but they had reverted to a deferred payment basis before signing their reports.

The delay and wasted costs that would occur if the evidence were to be excluded at the start of the trial was considered to conflict with the overriding objective, and would be disproportionate. Any risk of bias could be explored in cross-examination, and thus the evidence was admitted.

Expert Evidence preferred on 'literature'.

Carol Breeze (Personal Rep of Estate of Leonard Breeze) V Saeed Amed

[2005] EWCA Civ 223 CA (Civil Division), 8th March 2005.
(Sedley and Rix LLJ, and Bennett J).

C pursued fatal accident proceedings for negligence against her late husband's GP, claiming that if he had undertaken a proper examination of him, he would have referred him to the hospital immediately, and investigations would have revealed cardiac problems preventing his subsequent death a month later.

At trial, although that there had been a negligent examination, the GP was not liable to pay damages in respect of death. C failed to establish, on the balance of probabilities, that her husband's sudden cardiac death would have been avoided even if D acted with reasonable skill and care. In so finding, the judge preferred the evidence of D's cardiologist, stating that it was "***compellingly supported ... by recent literature***".

The judge had never been provided with copies of either of the relevant medical papers cited by D's expert, and took on trust what that expert said were their contents. C appealed submitting that in assessing which expert's evidence to accept on the issue of causation, the judge had placed more weight on the "literature" than he should have done. She contended she had had no proper opportunity to demonstrate the papers were at least neutral as between the experts, and at best supported the evidence of her expert. D argued C was attempting to introduce fresh evidence, that was not admissible, and she should have obtained both papers before trial and/or judgment.

Court if Appeal HELD (allowing the appeal and remitting back for retrial): The issue was not whether fresh evidence was to be admitted but rather, whether the judge's decision upon the matter under appeal was unjust because of a serious procedural or other irregularity in the proceedings. Neither of the papers was produced on behalf of D. Their contents, as relayed by D's expert in his evidence, were unwittingly portrayed to the judge inaccurately and/or incompletely.

The judge placed more weight on the "literature" than he should have done in the unusual circumstances of the case. C was deprived of the opportunity to show the judge that neither paper supported the evidence of D's expert, which, it was arguable C would have achieved. It would be unjust to leave the matter as it was. It should be remitted for retrial.

5. CPR Part 36

When Non-Payment In may be treated as a Payment In (Pre-Issue Offer).

CPR 36.10 Court to take into account offer to settle made before commencement of proceedings.

(1) If a person makes an **offer to settle before proceedings are begun which complies with the provisions of this rule, the court will take that offer into account** when making any order as to costs.

(2) The offer must—
- (a) be expressed to be open for at least 21 days after the date it was made;
- (b) if made by a person who would be a defendant were proceedings commenced, include an offer to pay the costs of the offeree incurred up to the date 21 days after the date it was made; and
- (c) otherwise comply with this Part.

(3) If the offeror is a defendant to a money claim—
- (a) he **must make a Part 36 payment within 14 days of service of the claim form**; and
- (b) the amount of the payment must be not less than the sum offered before proceedings began.

CPR 36.20 Costs consequences where claimant fails to do better than a Part 36 offer or a Part 36 payment

(1) This rule applies where at trial a claimant—
- (a) fails to better a Part 36 payment; or
- (b) fails to obtain a judgment which is more advantageous than a defendant's Part 36 offer.

(2) Unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without needing the permission of the court.

Compared with

36.1 Scope of this Part

(1) This Part contains rules about—
- (a) offers to settle and payments into court; and
- (b) the consequences where an offer to settle or payment into court is made in accordance with this Part.

(2) **Nothing in this Part prevents a party making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with this Part, it will only have the consequences specified in this Part if the court so orders**.

44.3 Court's discretion and circumstances to be taken into account when exercising its discretion as to costs …..

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including—

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into court or **admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36)**.

Trustees of Stokes Pension Fund V Western Power Distribution (South West) PLC [2005] CA (Civil Division) 11th July 2005. (Dyson and Auld LLJ).

The Defendant was a power distribution company. In October 2000, its contractors trespassed onto the Claimant's land and felled 400 trees growing under D's power lines.

- In February 2002, D wrote to C in a letter marked "without prejudice save as to costs" offering to settle for £35,000 before proceedings were issued, open for acceptance for 21 days. This was not accepted, and proceedings were issued claiming £780,000. D did not make a payment into Court after issue pursuant to CPR 36.10(3).

- D made a payment in of £20,000 in August 2002. C enquired whether service of the Notice of payment In meant the previous offer had been withdrawn. D replied that given C had not accepted the previous offer within 21 days it had lapsed, and for the avoidance of doubt it was no longer open for acceptance.

- At trial C was awarded damages amounting to £25,600. As they had beaten the payment in the Judge ordered that it was just to order D to pay a proportion of the costs, but because the amount claimed was unreasonable, and C had unreasonably exaggerated their claim, costs would be reduced by a half.

He also ordered that the February 2002 offer to settle should not affect the order for costs as (i) it had not been followed by a payment in, as contemplated by CPR 36(10)(3), and (ii) it was later withdrawn. D appealed.

CA HELD (allowing the appeal):

An offer by a Defendant to settle a money claim would not automatically have the costs consequences set out in CPR Part 36.20(2), unless made by way of a CPR Part 36 payment.

However, CPR Part 36.1(2) and CPR Part 44.3(4)(c) expressly provided that the Court could exercise its discretion to order that an offer made otherwise than in accordance with CPR Part 36 could have those consequences.

- They indicated that an offer should usually be treated as having the same effect as a payment into Court if the following conditions were satisfied:

    i. The offer was expressed in clear terms, so there was no doubt as to what was being offered;
    ii. The offer stated whether it related to the whole of the claim, or to part of it, or to an issue that arose in it, and if so which part or issue;
    iii. The offer stated whether it took into account any counterclaim;
    iv. If expressed not to be inclusive of interest, CPR Part 36.22(2) details concerning interest;
    v. The offer should be open for acceptance for at least 21 days, and otherwise accord with the substance of a Calderbank offer;
    vi. The offer should be genuine
    vii. D should be clearly have been good for the money when the offer was made.

- To decide the effect of any offer on costs, one had to look at the date when the offer should have been accepted. If “within 21 days”, on the face of it C should be entitled to his costs up to the date when the offer should have ordinarily been accepted, and D was entitled to costs thereafter.

- The mere fact an offer was withdrawn after the date for acceptance had passed should not lead to a different result.

- At first instance the Judge had made no finding as to whether and when C should have accepted the February 2002 offer. The Court of Appeal concluded that on the evidence before them, C should have accepted it within 21 days.

- Accordingly there were no grounds for holding that withdrawal of the offer should make any difference.

- The reasons given by the Judge for saying the February 2002 offer afforded the Defendant no costs protection were wrong in law. All the conditions identified were satisfied, thus the appeal would be allowed and C was liable for allof D’s costs from 21 days after the February 2002 offer.

& When an offer is not an offer (Tactical Offers).

Fotedar V St. George's Healthcare NHS Trust [2005] EWHC 1327

24th June 2005 High Court, QBD, Gray J.

D's Obstetric Senior Registrar delivered C using a ventouse cap. She suffered a haemorrhage causing severe brain damage, and a clinical negligence action was taken. At trial, the judge held that the Claimant's mother had not been fully dilated, remaining in the first stages of labour, when the ventouse was utilised. He determined that carrying out an instrumental delivery in such circumstances was negligent, and the risk of haemhorrage was greater when the mother was not fully dilated. D was held in breach of its duty of care.

- C had made an offer under CPR Part 36 to settle liability 95% in her favour. This expired the day before trial. D argued that this indemnity costs should be refused as this offer was purely tactical in nature
- In a consequential decision on costs, His Lordship determined, applying settled principles, where a CPR Part 36 offer was tactical in nature, the Judge could in the exercise of his discretion refuse to award costs on an indemnity basis.

This was such a case as C's CPR Part 36 offer expired only the day before trial commenced, and was made after the experts joint meeting when it was more apparent D had decided to contest liability.

- Furthermore, D had accepted 'causation' making it an "all or nothing claim".
- Thus His Lordship concluded a 5% deduction could not sensibly have been made to allow for the risks of litigation, notwithstanding that it could represent a significant amount of money. The application for indemnity costs was thus refused.

6. CPR Part 41 Periodical Payment Orders

Section 100 of the Courts Act 2003 came into force on the 1st April 2005, amending section 2 of the Damages Act 1996 and CPR Part 41.

- From the 1st April 2005, under Section 2(1) of the Damages Act 1996 a Court awarding damages for future pecuniary loss in respect of personal injury

MAY order that the damages are wholly or partly to take the form of periodical payments, and SHALL consider whether to make that order.

- This applies retrospectively, to all proceedings already issued, regardless of their value, and is a seminar in itself!
- Factors the Court must take account of are detailed in CPR Part 41.7 and CPR Part 41 PD 41B.

These are

:- all the circumstances of the case, and in particular

- the form of award that which best meets the Claimant's needs, having regard to the factors set out in the practice direction.

& Under CPR Part 41 PD 41B the factors identified are:

- The scale of annual payments, taking account of any deduction for Contributory Negligence;
- The Claimant's preference, the reasons for that preference and the nature of any financial advice received by the Claimant
- the Defendant's preference and the reason for that preference

There are detailed provisions for the contents of any Periodic Payment Order set out in CPR Part 41.8 and 41.9, with CPR Part 41.8(1)(b) attempting to ensure Orders reflect the distinction between: Loss of Earnings and Income;
and Care, medical costs (treatments, equipment) and other recurring or capital costs,
to facilitate the relationship between Periodical Payments and: Social Security Insolvency; and Local Authority residential care provisions.

- New provisions have been inserted into CPR Part 36 to accommodate periodical payment claims, namely CPR Part 36.2A.

NOTE that the power to award Variable Periodic Payment Orders under the Damages (Variation of Periodical Payments) Order 2005 SI 2005 No.841 applies only applies to proceedings issued after the 1-4-2005, and when made will contain obligations of retention of "Case Files" by the Court AND the parties for significant periods of time.

7. CPR 44 Costs following Trial on Liability alone and previous Payment In.

CPR Part 44.3 Court's discretion and circumstances to be taken into account when exercising its discretion as to costs

(1) The court has discretion as to—
(a) whether costs are payable by one party to another;
(b) the amount of those costs; and
(c) when they are to be paid.

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including—
(a) the conduct of all the parties;
(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).

(6) The orders which the court may make under this rule include an order that a party must pay— …..
(f) costs relating only to a distinct part of the proceedings;

CPR 36.19 Restriction on disclosure of a Part 36 offer or a Part 36 payment

(1) A Part 36 offer will be treated as "without prejudice except as to costs".

(2) The fact that a Part 36 payment has been made shall not be communicated to the trial judge until all questions of liability and the amount of money to be awarded have been decided.

HSS Hire Services Group PLC v (1) BMB Builders Merchants Ltd (2) Grafton Group (UK) PLC [2005] EWCA Civ 626 CA (Civil Division) 24th May 2005 (Waller LJ, Mance LJ, Sir William Aldous)

- D made a CPR Part 36 payment in, in a breach of contract claim. The Court subsequently ordered a split trial, with liability to be heard first. At trial, the Judge found in C's favour. He was then informed of the fact of the payment in being made prior to the Split Trial Order, but not the amount. The Judge ordered D to pay C's costs of the trial on liability, stating that under the CPR the Courts were encouraged to adopt an "issue based" approach to costs, and the separate trial of liability was a 2completely separate issue". C had expended money on it, and had won. Among the costs orders open to the Court was that a party may pay "*costs relating only to a distinct part of the proceedings*". He determined that the question of whether D may have to pay C more or less by way of damages than they had offered in their Part 36 payment did not affect the matter.

Court of Appeal HELD: Considering the question of what the right approach was to costs at the conclusion of a preliminary issue, if there had been a Part 36 payment in covering the trial as a whole was required.

- The provisions of CPR Part 36 and Part 44 encouraged the approach that at the conclusion of a trial of a preliminary issue, where there had been a Part 36 payment in or a Part 36 offer, the question of costs should be adjourned pending the resolution of all the issues including damages, at which stage the quantum of the Part 36 offer could be revealed, and the discretion in relation to costs exercised in the knowledge of it.
- CPR Part 36.19 did not allow for disclosure of the amount of a payment in.
- If there was a payment in, then in any but perhaps the most exceptional case, it was very difficult to think that there could be circumstances where if the damages remained to be decided the judge could do otherwise than to reserve the question of costs until after determination of that issue.
- The judge was not entitled to deal with costs in the way he did and should have reserved the same, pending determination of quantum. His order would be reversed to reflect that finding.

8. UPCOMING – Chamges To CFAs & CCFAs

Note from 1st November 2005, everything will change for CFA and CCFA funded claims. This too is a seminar in itself.

New regulations – the Conditional Fee Agreements (Revocation) Regulations 2005 – will come into force on the 1st November 2005. Repealing the previous 2000 and 2003 regulations.

The parties may then enter into CFAs and CCFAs based upon the primary legislation, section 27 of the Access to Justice Act 1999 (amending sections 58 and 58A of the Courts and Legal Services Act 1990), setting out the minimum legislative framework required to enable use of CFAs by legal representatives.

- There is a new model CFA agreement for use in personal injury and clinical negligence cases. Note this is to be supplemented by Law Society Guidelines for CFAs.

- New additional requirements for CCFAs are set out in the Access to Justice (Membership Organisation) Regulations 2005, also coming into force on the 1st November 2005. Again the primary legislation will assume greater importance, namely section 30 of the Access to Justice Act 1999, though regulations 4 and 5 still need to be complied with.

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Sources
Civil Procedure – White Book
Civil Procedure News
Lawtel
Edward Bishop – Resiling from Admissions
William Norris QC & Brian Langstaff QC – Periodical Payments
Gordon Exall QC Periodical Payments
Nigel Tomkins Consultancy - Personal Injury Training