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# Costs (interplay with Part 36), including offers and negotiation

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# The ambit of this talk

- The relevant cost regime
- Part 36 Offers
- Mediation

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# TLATA Costs Regime

- TLATA cases do not fall within the usual family costs rules.

- As with any litigation it is crucial to advise your client on the cost implications of making an application

- The amount of equity in the property that is the subject of the dispute should be considered in this context.

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The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order as it is given a wide discretion CPR 44.2(2)

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- In exercising their discretion on costs, the courts should consider all the circumstances of the case, including the conduct of the parties CPR 44.2(4)

- Conduct can include the conduct before, as well as during, the proceedings and the extent to which the parties may have followed the Practice Direction on Pre-Action Conduct (where, as with claims under TLATA 1996, no specific pre-action protocol applies)

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# Costs Budgeting

**Costs Budgeting**

In such Part 8 cases as have fallen into the regime (and TLATA claims are specifically vulnerable to allocation) and all Part 7 cases the Court will consider and manage the budgets (unless agreed) PD3E provides:

- ***7.1*** *Where costs budgets are filed and exchanged, the court will generally make a costs management order under rule 3.15. If the court makes a costs management order under rule 3.15, the following paragraphs shall apply.*

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# Costs Budgeting

***7.2*** *Save in exceptional circumstances-*

*(a)* ***the recoverable costs of initially completing Precedent H shall not exceed the higher of £1,000 or 1% of the approved or agreed budget****; and*

*(b)* ***all other recoverable costs of the budgeting and costs management process shall not exceed 2% of the approved or agreed budget****.*

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# Costs Budgeting

***7.3 If the budgets or parts of the budgets are agreed between all parties, the court will record the extent of such agreement. In so far as the budgets are not agreed, the court will review them*** *and, after making any appropriate revisions, record its approval of those budgets.* ***The court's approval will relate only to the total figures for each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure****. When reviewing budgets,* ***the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs****.*

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# Costs Budgeting

***7.4*** *As part of the costs management process* ***the court may not approve costs incurred before the date of any budget****. The court may, however, record its comments on those costs and will take those costs into account when considering the reasonableness and proportionality of all subsequent costs.*

***7.5*** *The court may set a timetable or give other directions for future* ***reviews of budgets****.*

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# Costs Budgeting

***7.6*** *Each party shall revise its budget in respect of future costs upwards or downwards, if significant developments in the litigation warrant such revisions. Such* ***amended budgets shall be submitted to the other parties for agreement. In default of agreement, the amended budgets shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party****. The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed.*

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# Costs Budgeting

***7.7*** *After its budget has been approved or agreed, each party shall re-file and re-serve the budget in the form approved or agreed with re-cast figures, annexed to the order approving it or recording its agreement.*

***7.8 A litigant in person, even though not required to prepare a budget, shall nevertheless be provided with a copy of the budget of any other party****.*

***7.9 If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets****.*

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# Part 36

- Note that Part 36 is a self-contained code (and wholly a creature of the CPR replacing the previous regime of payments into court in 1997).
- Of particular note:

  (i) CPR 36.2(2): *Nothing in this Section prevents a party making an offer to settle in whatever way that party chooses, but if the offer is not made in accordance with rule 36.5, it will not have the consequences specified in this Section*.

  (ii) CPR 36.7(1) A Part 36 offer may be made at any time, <u>including before the commencement of proceedings</u>.

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# Part 36

(iii) CPR 36.9(4)(b) allows an offer to be automatically withdrawn after a period albeit when withdrawn will not lead to the cost's consequences of Part 36;

(iv) CPR 36.9(5) confirms that an improved offer does not act to withdraw the previous offer (thus not depriving the offeror of its benefit);

(v) CPR 36.13(4,5) sets up a presumption that where a party accepts late, they will pay the costs of that period unless it would be unjust for them to do so on the particular facts.

(v) CPR 36.17 sets out the considerable consequences of success/failure.

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# Part 36

## Formality

- Form N242A contains all the necessary formal requirements – see Practice Direction 36A – Offers to Settle.
- A Part 36 offer must be in writing. It must state on its face that it is intended to have the consequences of Part 36 and specify a period of not less than 21 days within which the Defendant will be liable for the Claimant's costs in accordance with 36.10 if the offer is accepted. As before it must state whether it relates to the whole or part of the claim and whether it takes into account any counter claim. In practice the form needs to be used in slightly altered form to allow for the fact that it is the estate that will pay the costs if the offer is accepted.

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# Part 36

- Remember the limit of the court's jurisdiction under TLATA – declaratory and directed at the trustees rather than the beneficiaries.

- Try and tailor Part 36 offers to orders that the court may (and likely will) make to maximise the chance of success.

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# ADR

- Whilst ADR is not mandatory, there is an increasing emphasis on the role of ADR, and the court being more willing to make costs orders due to failures to engage in ADR.

- The *Jackson ADR Handbook* is a sensible first point of reference for any application for costs based on a failure to mediate.

- The CPR and the Chancery Guide make clear that judges and parties must consider ADR at all stages of litigation with a view to achieving the Overriding Objective of enabling the court to deal with cases justly and at proportionate cost

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- Discussion and Negotiation
- **Mediation** (a form of negotiation with the help of an independent person);
- **Early Neutral Evaluation** (where an independent person**,** for example a lawyer or an expert on the subject, gives an opinion on the merits of the dispute and now sometimes confusingly used judicially to refer to a quasi-FDR hearing); or
- Arbitration

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# Assessment of suitability of Mediation

In ***Halsey v Milton Keynes General NHS Trust*** **[2004] 1 WLR 3002** the Court of Appeal said the following factors should be: -

- *nature of the dispute*
- *merits*
- *failure of other settlement attempts*
- *costs of mediation disproportionate*
- *delay*
- *whether any prospect of ADR succeeding*

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# Mediation and Costs

**PGF II SA v OMFS Co. Ltd [2014] 1 WLR 1386**

- In the case of **PGF II SA v OMFS Co. Ltd [2014] 1 WLR 1386** the CA upheld the decision of a judge to disallow a successful defendant the costs he would have been entitled to when the claimant accepted the defendants Part 36 offer dated 11/4/11 on 10/1/12, the day before trial.

  "*Firmly endorsed the advice given in Chapter 11.56 of the ADR Handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified, by the identification of reasonable grounds*."

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# Mediation and Costs

- The Court of Appeal also (at para.30) expressly commended the advice in the *Handbook* at 11.56 as to how a party who believes he has reasonable grounds for refusing to participate at a given stage and wishes to avoid a costs sanction should behave in response to a request to engage in ADR.
- a) do not ignore the request;
- b) respond promptly in writing giving clear and full reasons why ADR is not appropriate at the stage based if possible on the *Halsey* guidelines;
- c) raise any shortage of information/evidence with proposals as to how that shortage might be overcome;
- d) do not close off ADR of any kind and for all time.

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# Mediation and Costs

- The CPR Practice Direction on pre-action conduct and protocols.

*16. The court will consider the effect of any non-compliance when deciding whether to impose any sanctions which may include—*

*(a) an order that the party at fault pays the costs of the proceedings, or part of the costs of the other party or parties;*

*(b) an order that the party at fault pay those costs on an indemnity basis;*

*(c) if the party at fault is a claimant who has been awarded a sum of money, an order depriving that party of interest on that sum for a specified period, and/or awarding interest at a lower rate than would otherwise have been awarded;*

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# Mediation and Costs

*(d) if the party at fault is a defendant, and the claimant has been awarded a sum of money, an order awarding interest on that sum for a specified period at a higher rate, (not exceeding 10% above base rate), than the rate which would otherwise have been awarded.*

- NB Unreasonably refusing or ignoring an offer to mediate is expressly included in the list of possibly non-compliant behaviour (see para. 14).

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# Mediation and Costs

**Garritt-Critchley v Ronan & another [2014] EWHC 1774**

In that case the Claimant sought £208,000 in his letter of claim but suggested appropriate ADR such as mediation. The Defendant failed to engage in ADR after some robust correspondence which was considered in detail by the Judge:

"*Both we and our clients are well aware of the penalties the court might seek to impose if we are unreasonably found to refuse mediation, but we are confident that in a matter in which our clients are extremely confident of their position and do not consider there is any realistic prospect that your client will succeed, the rejection is entirely reasonable."*

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- The case went to trial after C offered to settle for £10,000.
- After trial, but before judgment, D accepted the offer to settle for £10,000 + standard basis costs.
- C sought costs of the whole case on the indemnity basis.
- The Defendants sought to justify their refusal to mediate on the grounds that the parties were too far apart, that there was no “middle ground” and that the parties disliked each other too much to engage in meaningful dialogue. They also raised a proportionality point.

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- The Judge rejected all of the Defendant's arguments and said that this is just what mediation is for – finding solutions and helping parties get over poor relationships. He ordered the Defendant to pay costs on the indemnity basis.

- "*Parties don't know whether in truth they are too far apart unless they sit down and explore settlement. If they are irreconcilably too far apart, then the mediator will say as much within the first hour of mediation. That happens very rarely in my experience*".

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# Mediation and Costs

- **Thakkar v Patel [2017] EWCA Civ 117**
- Here the defendants did not ignore or refuse an offer to mediate, "*but they dragged their feet and delayed until eventually the claimant's lost confidence in the whole ADR process*". Jackson LJ stated: "The message which the court sends out in this case is that in a case where bilateral negotiations fail but mediation is obviously appropriate, it behoves both parties to get on with it. If one party frustrates the process by delaying and dragging its feet for no good reason, that will merit a costs sanction."
- Court ordered D to pay 75% of C's costs of the claim and ordered the claimants to pay the defendants costs of the counterclaim.

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# Mediation and Costs

- **Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C4I) Ltd (No.2) [2014] EWHC 3148 (TCC)**

Ramsey J decided that although a refusal to mediate was prima facie unreasonable, it should not result in a costs sanction because of other relevant conduct by the refusing party who made a without prejudice save as to costs proposal.

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# Mediation and Costs

- **<u>Laporte v The Commissioner of Police of the Metropolis [2015] EWHC 371 (QB)</u>**

- The defendant, who was successful on every substantive issue, was awarded only two thirds of his costs. This was the consequence of the court's finding that the defendant had failed, without adequate justification, to fully and adequately engage in the ADR process, notwithstanding that the outcome of such process was not certain.

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# Mediation and Costs

- **Simon Kelly v Raymond Kelly (2020)**
- The parties (father and son) had attempted to resolve their case by mediation on two occasions. Each time the Claimant had failed to honour the mediation agreements and so the Defendant refused a third attempt at mediation. The court found that the Defendant's refusal was understandable and reasonable given the risk of further broken promises and awarded him his costs on the indemnity basis as claimed

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# Mediation and Costs

- **Gore v Naheed [2017] EWCA Civ 369**
- A dispute between neighbours about a claimant's right of way to a shared driveway for access and the defendant's right to obstruct the driveway to unload lorries for their wine business. The trial judge found in the claimant's favour and ordered that the Defendants pay the claimants costs. The defendant appealed arguing that the claimants failed to engage with their invitations to mediate and therefore the judge was wrong not to have made some deduction or allowance in the claimant's costs.

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# Mediation and Costs

- **Gore v Naheed [2017] EWCA Civ 369 cont.**
- Court of Appeal upheld the lower court's decision and Patten LJ stated as follows:

> *"Speaking for myself, I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated…. A failure to engage, even if unreasonable, does not automatically result in a costs penalty. It is simply a factor to be taken into account by the judge when exercising his costs discretion."*

NB appellate courts considering costs decisions afford first instance judges very considerable latitude.

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# Practicalities

- **Choosing the mediator/ENE/FDR facilitator.**

  The value of specific expertise.

- **Remote / Hybrid**

  As with private FDRs and other family mediations. These hearings can be just as effective as “in person” hearings, if not better, because they might conducted from the comfort of the litigant’s own home thus reducing the burden of stress and anxiety which can itself act as a barrier to settlement.

- **Who pays the costs of mediation?**

  The standard practice is that each party pays their own costs and a half share of the common costs (mediator/premises).

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# Drawing up the agreement

This almost always takes twice as long as you expect – the devil is in the detail. Better not to let the mediator go until all parties have signed. Sometimes it is not possible to draw up a binding agreement – e.g. where a party is under a disability or an unrepresented party wants to consult an advisor.

**Frost v Wake Smith & Tofields Solicitors [2013] EWCA Civ 1960**: the solicitor's duty is to advise his client as to the mediation process and the status of any agreement reached but not to "conjure finality from a provisional agreement".