Weighing the costs
Latest trends and cases in litigation funding
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Our costs unit services

1. Pre-project/litigation:
   - bespoke retainer and alternate fee advice
   - advice on third party funding options
   - advice on after the event (ATE) insurance and managing litigation risk

2. During project/litigation:
   - preparation of budgets and case plans
   - monitoring of spend versus budget on a “phase-by-phase” basis
   - preparation of precedent H forms for case management conferences
   - advice on and negotiating budgets
   - attendance at costs management conferences
   - advice on the costs implications of without prejudice and part 36 offers
   - preparation of statements of costs for interim hearings
   - advice on and preparation of statements to support schedules of costs for security for costs applications
   - provide expert witness services in relation to costs recovery and procedure in the UK
   - consideration of and advice in relation to draft judgments to include preparing or assisting with the preparation of costs submissions

3. Post-project/litigation, we offer a full cradle to grave costs service for both paying and receiving parties including:
   - schedules of costs
   - bill drafting
   - points of dispute / replies
   - advice on settlement and points of law
   - negotiating with third parties and insurers
   - part 8 costs only proceedings
   - representing clients in disputes with their previous solicitor
   - attendance at detailed assessment hearings
Welcome to the summer 2017 edition of Costs Guru which concentrates on the latest trends and cases in respect of litigation funding.

Our guest writer this month is experienced insurance and litigation funding broker, Clive Petty from JLT. Clive and I have worked on a number of projects together over the last 18 months and I am extremely grateful to him for giving up his time to contribute to this edition.

The costs of litigation are a complete headache for a number of our clients. Unlike project or transactional work, which can be fairly accurately assessed at an early stage, litigation is often uncertain in terms of duration, complexity, direction and outcome. This means that even the most carefully scoped estimates can be subject to change. As such, the potential legal costs and protracted and uncertain nature of litigation can prove to be a barrier to bringing claims even where it is considered there are good prospects of a successful outcome.

Clients want certainty, innovative funding solutions, for their lawyers to have ‘skin in the game’ and, just as importantly, they do not want to commit funds to litigation at the expense of other projects. Ultimately, for lawyers, law is a business. For clients, it is a drain on resources, both in terms of money and time.

Still further, many large companies will have a dedicated in-house legal team and/or a defined legal budget. Often, the team, and the budget, is spent on that which is essential, defending claims brought against that company. As a result, there is little or no resource left to pursue legitimate claims, even those claims with good prospects of success.

Whilst often looked upon, in the past at least, as the last and desperate hope of the impecunious litigant to land his/her big damages claim, third party funding is now being considered, and used, by a number of large companies, to bring claims which, in the scenario outlined above, they simply would not have the resources to bring. BT, for example, have recently agreed a £40million litigation funding package, the exact details of which are confidential, but which essentially exists to fund the recovery cases which BT’s legal team are unable to bring as they are fully utilised defending claims.
As is outlined elsewhere in Guru, litigation funding is a trade-off which minimises risk but ultimately reduces recovery. However, in circumstances where you simply do not have the resources, or would simply rather keep the legal spend off book, better to recover something than nothing. Further, to do so risk free.

Of course, and whilst much of this publication looks at third party funding, that is not the only alternative fee arrangement which one can enter into. Anyone who has not yet received or read Eversheds Sutherland’s “Managing the Costs of Litigation” guide, I urge you to do so. Please contact me direct if you would like a copy.

Fixed fees, blended rates, caps and collars, hold back agreements, contingency or damages based agreements, and even the more traditional conditional fee agreements, are all potential ways in which litigation can be funded and managed. Again, please feel free to contact me, or any member of the Litigation team, if you would like to discuss potential funding options.

Returning to costs, Lord Justice Jackson’s report in relation to fixed fees in litigation matters is expected to be published towards the end of July. Guru will issue an update as soon as the details are known. Further, we are proud to announce that Eversheds Sutherland will be hosting, in September at our Wood Street offices, the annual Costs Law Reports conference at which Jackson LJ will be the key note speaker, possibly his first speaking appointment following the publication of his report. The autumn edition of Guru will carry full details of this speech and of the event generally.

Finally, with the holiday season approaching, it only leaves me to wish you all a pleasant summer and thank you again for taking the time to read Guru.

Glenn Newberry
Head of Costs
T: +44 2920 47 7220
M: +44 7879 66 3415
glennnewberry@eversheds-sutherland.com
Brief History

As with so many fields of activity, the pace of change in the sphere of litigation funding has been rapid. Just a few years ago, litigation funding comprised a lawyer working on a CFA together with an adverse costs insurance policy with a deferred premium. Whilst this modus operandi remains a staple in certain areas of law, such as insolvency, the advent of the Jackson reforms has spawned numerous developments.

The pace of change picked up when US funders such as Burford Capital moved in to supplement the three or four indigenous fledgling funders, many of whom now ‘self-regulate’ by way of the Association of Litigation Funders.

Inevitably in an emerging market, its growth has had certain restrictions imposed by way of several judgments such as those contained in *Arkin*¹ and *Excalibur*². These judgments ensured that third party funders took due regard to the potential adverse costs risk in a piece of litigation, essentially making them ultimately responsible.

With these issues now behind us, there has been a considerable increase in interest in litigation funding. This has attracted hedge funds, looking for attractive returns in non-correlated sectors, who have entered the market.

Today there are 15 or 20 litigation funders with varying amounts of capital to invest. These funders fall into broadly three categories: publicly quoted companies who generally look for the larger claims; private offices/hedge fund backed businesses; opportunistic/specialist funders/agencies. It should be noted that these funders are providing capital on a currently unregulated basis: this is in contrast to ATE insurance which is heavily regulated. This can, and indeed has been, a problem for the industry.

“It is fair to say that litigation funding is now a proper and respectable tool to be deployed in appropriate situations”

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¹ *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655.
² *Excalibur Ventures LLC v Texas Keystone Inc. and others* [2016] EWCA Civ 1144.
Current trends
It is fair to say that litigation funding is now a proper and respectable tool to be deployed in appropriate situations. However, the industry is still in its infancy and most funders do not yet have sufficient track record to be able to forecast with any certainty what the weighted average cost of these funding agreements should be. Therefore prices have remained quite high, especially compared with the cost of ATE insurance. The growing number of new entrants and a maturing market will probably force prices down over time. Facilities of between £250k and £10m can be secured along with appropriate amounts of ATE insurance to deal with the adverse costs element.

As you would expect, litigation funding deals are being concluded with pricing based on merits, time to conclusion, veracity of quantum and collectability.

However, with the increasing number of funders, and indeed ATE insurers, it is becoming increasingly complicated and time consuming for solicitors to undertake the task of securing the optimum terms for their clients.
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My experience is that a good, well-presented funding opportunity can attract several offers of funding and consequently this degree of competition can drive down prices.

As a general guide, litigation funders look for a return based on funds actually deployed with a base multiple of up to around two-to-three times if the case wins at trial but with staged discounts if the case settles earlier, or a percentage of damages, whichever is greater.

In constructing the funding budget solicitors should assume the unexpected and build in sensible contingencies.

Other financing tools which enable a claimant to cost-effectively run a case include security for costs bonds and freezing order fortification bonds.

In addition to the mainstream funders, several have chosen to concentrate their expertise in certain niches. Of particular note are funders who specialise in judgment enforcement, undertaken in collaboration with asset recovery agents across the globe.

Future trends
There are a number of emerging trends which we can expect will become more mainstream as the market matures:

1. Routes to market
   As litigation funding becomes more of a regularly used financing tool by solicitor firms there will be firm-wide facilities put in place in order to ensure continuity of service and a reduction in frictional costs. These facilities will need to be regularly reviewed to ensure that the pricing remains competitive.

2. Pricing
   As the market matures and genuine outcome statistics become available, we can expect to see a lowering of cost of finance. This will also be driven by new entrants seeking market share.

3. Solicitor funding
   At some point we can expect the DBA model to become increasingly popular in appropriate cases. Litigation funding can play its part in providing non-recourse bridging finance to the law firm in exchange for a share of the DBA return. This is already beginning to happen.

4. Corporate capital
   I have witnessed a growing trend for large organisations to view litigation funding as a way of replacing their in-house need to fund litigation. External funding can replace this cash need, and, by looking at cases on a cross-collateralised portfolio basis, can be provided on a more cost effective basis. There are also some significant
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accompanying P&L benefits to the corporate in adopting this strategy.

5. Use of brokers
When there were few funders and ATE insurers in the market it was not impossible for solicitors to source suitable arrangements themselves. However, with the growing number of players and options, the use of a competent broker will become more important in order to (a) save time and (b) review all the relevant options in order to secure the most appropriate arrangements. We will approach Litigation Funders and ATE insurers at the same time. This creates a proper market and as a result a client will have comfort that competitive terms have been received.

Jeff Bezos, Amazon, was recently asked, “What will change in the future?.” His answer was, “That’s the wrong question... you should ask what will stay the same?”

About JLT Specialty
JLT is a large multi-discipline insurance broker with some 15000 staff across the major countries of the world. We have a dedicated unit in London specifically geared to securing ATE insurance and making litigation funding introductions.

Clive Petty JLT Specialty

Contacts:

Julia Mahoney
Julia_Mahoney@jltgroup.com

Clive Petty
Clive_Petty@jltgroup.com

Jim Driver
Jim_Driver@jltgroup.com
Third party funders’ liability for third party costs: increased risk without reward?

Since the implementation of the Jackson reforms removed the recoverability of success fees on conditional fee agreements (CFAs) and premiums on after the event insurance policies (ATEs) there has been a steady increase in the number of third party funders prepared to lend their financial support to, in particular, high value commercial matters in return for a share of the damages.

Litigation is, of course, not risk free, but following the decision in *Excalibur Ventures LLC v Texas Keystone Inc. and others* [2016] EWCA Civ 1144, a funder may not only lose their investment, but they may also face a liability for adverse costs over and above that which may be provided for by virtue of an ATE policy.
The facts

Excalibur brought a claim against Texas Keystone and others claiming an interest in a number of oil fields in Kurdistan. Reportedly valued at $1.6 billion, the claim was backed by a group of third party funders. These funders were not traditional funders and had minimal experience of litigation funding.

Between November 2010 and March 2013, the funders advanced £31.75 million to Excalibur. Of this sum, £14.25 million was provided to meet their legal fees and disbursements, £17.5 million was paid into court as security for costs.

Following a 57-day trial, Lord Justice Clarke found the claims advanced by Excalibur to be an “elaborate and artificial construct…replete with defects, illogicalities and inherent improbabilities” and that the case was “essentially speculative and opportunistic”. The claim failed and Excalibur were ordered to pay the defendants’ costs on an indemnity basis.

In addition to the £17.5 million advanced by the funders and paid into court as security for costs, Excalibur were ordered to pay an additional £5.6 million which could be sought from the funders through a non-party costs order, in the event Excalibur failed to pay.
Excalibur did fail to pay and the funders were subsequently joined to the proceedings and ordered to pay the adverse costs on an indemnity basis. The funders appealed the finding that they were jointly and severally liable to pay adverse costs on an indemnity basis. They argued it was not appropriate to order them to pay adverse costs on this basis as they had not personally been guilty of any discreditable conduct or conduct capable of criticism – they had provided security for costs and should not be treated any differently from funders who advance money for legal fees and the costs of expert witnesses.

The key issues for the Court of Appeal included:

- whether the funders’ liability for costs should be on the same basis as that ordered against the claimant – i.e. costs on the indemnity basis
- whether the sums provided by way of security should be taken into account for the purposes of the Arkin cap\(^3\)

Key points from the judgment

- the funders should bear the costs subject to the Arkin cap (i.e. their liability should be capped at an equivalent sum to the amount they invested)
- when considering liability for adverse costs, the overall liability included the entirety of the funder’s exposure. As such, the sums provided to Excalibur for security of costs was an investment in the claim in the same way as the sums provided to pay Excalibur’s own legal costs. They were to be taken into account for the purposes of the Arkin cap
- a funder could not disassociate itself from the conduct of the party it had provided funding to and from whose litigation it had sought to make a return. The fact that the funder’s conduct was not subject to criticism was irrelevant
- a funder’s liability arises from the point at which they became involved in the litigation. A funder who steps in during the latter stages of the proceedings will not be found retrospectively liable for costs
- parent companies of third party funders are not necessarily immune from liability for adverse costs. The question is, who is the ultimate beneficiary of success?

\(^3\) The so-called Arkin cap is the principle which limits the liability of a commercial third party funder for adverse costs to an amount equivalent to the funding provided. For example, a funder who provided £500,000 to a claimant to fund their litigation would have their potential liability for the other side’s adverse costs limited to £500,000 (Arkin v Borchard Lines Ltd [2005] EWCA Civ 655).
Legacy

The decision in *Excalibur* has helped clarify the liability of third party funders and indeed, and perhaps surprisingly, has been welcomed by the Association of Litigation Funders, the body charged by the Ministry of Justice via the Civil Justice Council with delivering self-regulation of third party funders in England and Wales.

As well as clarifying a funder’s potential liability for adverse costs, it also highlights the importance for funders to look beyond their commercial interest in the litigation, by exercising sufficient due diligence and monitoring, such as undertaking regular reviews of the facts, law and evidence as the case passes through its various phases. In short, it promotes what should be good practice.

The decision indicates an acceptance of professional third party funding as part of the legal landscape in this jurisdiction.

Richard Antuch
Associate
T: +44 29 2047 8086
richardantuch@eversheds-sutherland.com
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Widening scope for third party funding

Litigation or third party funding in the UK has, until recently, been a bespoke product aimed at high end commercial litigation, usually with an investment of several million pounds. Litigation funding is a business that decides whether to fund cases based on risk and return.

Most funders have focused on high value cases, as the returns required to make the venture a successful one commercially will have to outstrip the investment considerably, as well as ensure that there is sufficient money in the pot at the conclusion of the case to satisfy all stakeholders. Typically, funders will be looking at investment in cases where the damages are at least £1 million (some funders’ threshold can be as high as £5 million or even £10 million), and that such damages represent at least 10 times the expected funding figure.

So for example, to underwrite legal fees of say £500,000, many funders would only do so if anticipated damages were at least £5,000,000.

At the conclusion, the funder would typically be seeking either return of monies plus three times investment, or 1/3rd of the damages. In the above scenario, assuming the full £500,000 was advanced and at trial £3 million was awarded, the funder would be looking for the £500,000 to be returned, plus £1.5 million. That is three times investment, leaving the client with £1 million gross, possibly closer to £1.5 million once costs were recovered.

This may, on its face not sound like a great return for the client, but a number of large businesses focus their legal spend on defending claims and, as such, have no budget to bring claims. Funders offer these businesses a risk free opportunity to make a return on claims which they would otherwise choose not to bring - £1.5 million is certainly better than nothing.
This trend contrasts with jurisdictions like Germany where lower value cases have readily attracted funders for some time. This is due in part to greater control of the costs of litigation, such costs being set out by way of tariffs and generally lower than the UK, where investment in a 100,000 euro case works well with costs funded of approximately 15,000 euros under the predictable tariff. Such cost control making the risk and return ratio of smaller cases more attractive. Further, the UK common law bans on maintenance and champerty do not exist, such that funders can operate under assignment enabling them to control the case. One of the major planks of UK funding is that the funder is not to have control of the case.

Moving forward, assuming Lord Justice Jackson’s fixed costs regime is implemented, we will likely see fixed costs being implemented on all cases up to, it is believed, £100,000. Providing certainty as to the costs of a case would potentially make these lower value cases more attractive to funders, allowing such funding agreements to become more common-place as they are in Germany. Funders may even develop niches with specialisations and large portfolios of such cases, enabling them to spread the risk as a result of volume whilst also delivering a sufficient return on investment.

Whilst this continuing shift in third party funding provides consumers with more choices on the funding of a case, whether it be by means of such funding, conditional fee agreement, after the event insurance, or even a combination of all three, what is clear is if fixed costs are implemented, proper and accurate budgeting at the outset becomes even more important.

Louise Hoyle
Costs Lawyer
T: +44 2920 47 7346
louisehoyle@eversheds-sutherland.com

See Litigation Funding; Status and Issues a research report prepared by Christopher Hodges, John Peysner and Angus Nurse for the Centre for Socio-Legal Studies Oxford, and Lincoln Law School, January 2012.
The impact of assignment on the recoverability of additional liabilities

One of the main objectives of the first round of the Jackson reforms, culminating in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), was that success fees under a conditional fee agreement (CFA) and after the event (ATE) insurance premiums were no longer recoverable from the losing party, where the agreement was entered into on or after 1 April 2013. In what is widely regarded as one of the lead cases on payment protection insurance (PPI) matters, the court, when considering the costs claim in *Plevin v Paragon Personal Finance Limited* [2017] UKSC 23, looked at the transitional provisions and what happens when a pre-1 April 2013 agreement is varied or transferred post-1 April 2013.
Mrs Plevin had entered into a CFA with her original solicitors, Miller Gardner, in order to bring a claim for damages for mis-sold PPI. Subsequently, there were two changes of solicitor, both of which arose out of organisational changes within the same firm. The CFA was assigned in both instances to the new solicitors.

The original CFA covered all proceedings up to and including trial, as well as all steps taken to seek permission to appeal from an adverse result at trial. Mrs Plevin and Miller Gardner entered into a deed of variation extending the CFA to cover the proceedings in the Court of Appeal and a similar deed was entered into when permission to appeal to the Supreme Court had been given. Both deeds were entered into after 1 April 2013.

The ATE policy was originally taken out on 29 October 2008, and was topped up for the appeals to the Court of Appeal and Supreme Court, after 1 April 2013.

The Supreme Court assessed Mrs Plevin’s costs at £751,463.84, which included £31,378.92 for the solicitors’ success fee and £531,235 for the ATE insurance premium.

The appellant, Paragon Personal Finance Limited, applied for a review of costs on two grounds:–

1. in relation to the success fee, they alleged that the CFA was not validly assigned to the firms that replaced the respondent’s original solicitors on the record
2. In relation to both the success fee and the ATE premium, these were not recoverable because they were payable under arrangements made by the respondent after LASPO came into force.

In this article I have not considered the first point in any great detail, suffice to say it is fact specific and in the current case the court considered there had been valid assignments.

The appellant argued that the two deeds of variations of the CFA were new agreements, which were entered into after 1 April 2013, so were not covered by the transitional provisions of section 44(6) of LASPO. This would mean that the success fee could not be recovered.

The court however found that the two deeds of variation to the CFA were variations of the original CFA and both related to the matter that was the subject of the proceedings. The success fee was therefore recoverable from the appellant, even though the variations had been entered into after 1 April 2013.

Turning to the ATE premium, the appellant argued that the top-up premiums paid post-1 April 2013 for Court of Appeal and Supreme Court hearings were not recoverable.

The recoverability of the insurance premium turned on the meaning of section 46(3) of LASPO which refers to an insurance policy “in relation to proceedings”. The question for the court to address was whether the two appeals were part of the same “proceedings” as the underlying case.

The court considered the meaning of proceedings and for the purpose of assessing costs, the trial and successive appeals would usually be considered separate proceedings. Each claim for costs would be sought in accordance with a different order. However, the court held that proceedings brought in support of a claim were not over until the court had finally disposed of the claim. The purpose of LASPO and the transitional provisions were to preserve the rights and expectations under the previous law. That purpose would be defeated by a distinction between different stages of the same proceedings.
The success fee and top up insurance premiums were therefore recoverable from the appellant despite the former being varied post-1 April 2013, and the latter being incurred post-1 April 2013.

For the majority of proceedings the position remains that additional liabilities in respect of agreements entered into post-1 April 2013 will not be recoverable, but where a pre-1 April 2013 agreement is transferred, varied or topped up, the liability remains and continues.

**Joanne Dorgan**  
*Costs Lawyer*  
T: +44 29 2047 7179  
joannedorgan@eversheds-sutherland.com
The effect of costs budgets on detailed assessment

The Court of Appeal has recently handed down its long awaited judgment in the case of *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792, which considered the relationship between the costs budgeting regime in litigation matters, and the ultimate assessment of those costs by the court.

In April 2013, the Jackson Reforms came into force which included as one of its major planks, the requirement to prepare costs budgets on the majority of cases (currently all multi track cases up to £10 million). Since then, courts and practitioners have wrestled with the relationship between budgets, and the traditional tail end assessment of costs.

When submitting a budget to the court for approval, such budget will be split into costs incurred and budgeted costs to be incurred. The court will consider the latter but not the former. However, the overall budget set takes account of both. The Court of Appeal were forced to consider the position whereby a budget was set but without the court having considered in any detail, if at all, the costs incurred pre budget.

In short, the Court of Appeal held:
1. pre-budget costs are open for reduction on detailed assessment
2. budgeted costs are not as long as the same are within budget
3. save the court can consider proportionality of the entire costs claim and this includes budgeted as well as pre budget costs

The decision brings clarity to clients and practitioners alike as to both the likely recovery if successful, but also the likely exposure if not.

The Court of Appeal have laid down a clear message as to the importance of getting the budget right. Still further, the importance of costs management hearings.

The risks of filing a tactical budget

The importance of preparing realistic costs budgets and objections was emphasised by Mr Justice Coulson in the case of *Findcharm Limited v Churchill Group Limited* [2017] EWHC 1108 (TC).
In a claim for damages to property following a gas explosion valued at more than £800,000, the claimant filed a costs budget totalling £244,000. The defendant’s budget totalled £79,371 and suggested the claimant’s budget for estimated costs should be £46,900.

The defendant’s budget, which had been agreed by the claimant, was considered to be unrealistically low. Moreover, Coulson J considered the defendant’s Precedent R was of “no utility”, making completely unrealistic offers against the phases of the claimant’s budget. Parties are obliged to liaise and agree budgets where possible, thus reducing the demand on the court’s time.

The defendant’s offers were disregarded. Coulson J remarked that the defendant’s conduct was “an abuse of the cost budgeting process” and he was “obliged to disregard Churchill’s Precedent

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3 British and Irish Legal Information Institute (BAILII).
On the facts, he concluded that the claimant’s budget was both proportionate and reasonable and allowed it in the sum claimed. If the judgment alone does not press home the importance of properly adhering to the Precedent R process, one need only add that the judgment found its way to BAILII as a direct result of Coulson J’s request.

**Pre-LASPO position confirmed on recoverability in defamation and privacy claims**

Lord Justice Jackson’s 2013 reforms, which ended the recoverability of success fees and after the event insurance premiums from unsuccessful paying parties, did not extend as far as defamation and privacy claims. In the Supreme Court case of *Times Newspapers Limited v Flood, Miller v Associated Newspapers Limited and Frost and Others v MGN Limited* [2017] UKSC 33, the newspapers sought to challenge the position.

MGN Limited had faced allegations of phone hacking, whilst Times Newspapers Limited and Associated Newspapers Limited had been involved in libel actions. Adverse costs orders were made against all three. They all appealed and sought to contest the orders for adverse costs on the grounds that their rights to freedom of expression were infringed under article 10 of the European Convention on Human Rights. The parties relied upon the European Court of Human Rights decision in the case of *MGN v UK* [2011] ECHR 66, 39401/04, which held that an order to reimburse a success fee and ATE premium amounted to an infringement of the right to freedom of expression.

The appeals were dismissed. Whilst accepting that the appellants article 10 rights were engaged, the supreme court held that the UK government was not a party to the appeals and it would not be appropriate for a view to be taken on the infringement of the rights enshrined in article 10. Furthermore, the claimants had relied on a provision contained in statute, something which they were entitled to rely upon. As such, to deny the recoverability of the additional liabilities would have amounted to an infringement of the claimants’ rights.

**Significant development in litigation enable claimants restricted to court fees to amend budget**

In *Asgar & Another v Bhatti & Another* (2017), the claimants failed to file their costs budget and an order was made in October 2015 under CPR 3.14 that the claimants were treated as having filed a budget comprising of applicable court fees only. As such, their potential costs recovery, if successful, would be severely limited. The claimants were unsuccessful in their application for relief from sanctions.
Further into the litigation it became apparent that the trial was likely to last twelve days, rather than the six days initially anticipated. All parties, including the claimants, sought to amend their budgets to reflect the change.

At first instance, the master permitted the revision of the claimants’ budget to include the six additional days for trial. One of the issues on appeal was whether the effect of the master’s order was to overturn the sanction imposed in October 2015.

It was held that the master was entitled to find that the additional days of trial anticipated amounted to a significant development that had arisen since the claimants’ failure to file their costs budget. It amounted to a permitted ground for revision of the budget and did not undermine CPR 3.14. The only grounds on which the appeal could have succeeded was if it could be shown that the master had reached her decision outside the generous ambit of her discretion.

Steven Cox
Trainee Costs Lawyer
T: +44 29 2047 7609
stevencox@eversheds-sutherland.com