Professor Dominic Regan
Notes for the ACL Annual Manchester Costs Conference
18 May 2018

There has been a recent flurry of significant decisions where conduct, or frankly misconduct, has influenced the Court.

Conduct is explicitly recognised under CPR 36 .17(5) (d). Normal Part 36 consequences can be abandoned where it would be unjust for them to apply . To this end , the court is compelled to consider " the conduct of the parties with regard to the giving or refusal to give information for the purposes of enabling the offer to be made or evaluated ".

Yet again, there are sweeping powers under CPR 44.11(1) (b) to impose costs sanctions where the conduct of a party or their legal representative was unreasonable or improper. This applies to anything done before or during litigation and to assessment proceedings too. **JAGO V WHITBREAD GROUP PLC** , a decision of Master Whalen sitting in the Senior Courts Cost Office on 5th October 2016 , the receiving party was heavily penalised for misguided impropriety in preparing a bill .Mere improper conduct, not necessarily striking off the Rolls misdemeanours , falls within the scope of theCPR 44,11 test; see **RIDEHALGH V HORSEFIELD (1994) 3 AER** at 861 and 862. It matters not whether it violates the letter of any professional code. Master Whelan declared the saga was a " cock up " and there was no suggestion of duplicity here . Nevertheless, the conduct was improper and so a hefty 50% of the bill was disallowed. Tens of thousands of pounds went out of the window.

“The parties are obliged to make reasonable efforts to settle, and to respond properly to Part 36 offers made by the other side. The regime of sanctions and rewards has been introduced to incentivise parties to behave reasonably, and if they do not, the court's powers can be expected to be used to their disadvantage. The parties are obliged to conduct litigation collaboratively and to engage constructively in a settlement process."So said Vos LJ in **OMV PETROM V GLENCORE (2017) EWCA Civ 195**. The Court held that Part 36 was not merely compensatory; there is an element of carrot and stick.

Consequently, D was ordered to pay punitive interest at 10% above base on costs and damages.

Proportionality remains a mystery. The Court of Appeal decision in **BNM V MGN (2017) EWCA Civ 1767** declined to give any guidance on the application of the test which leaves arguments wide open. The Court did declare that the new Jackson test applies to every action issued from April 1st 2013 .The **MAY** appeal has been allowed with recoverable costs being upped from £35,000 to £75,000 (plus vat). The Court took account of the potential value of the claim rather than the amount of the settlement and the complexity of the law of nuisance . Proportionality is not an exercise in discretion but rather one of Law. The conduct of the paying party is one of the 5 explicit issues that go to the proportionality of costs test. Note that in **SOLANSKI V INTERCITY TELECOM (2018) 1 Costs LR 103** Gloster LJ at paragraph 70 directed that the conduct of the receiving party be scrutinised when considering proportionality. She declared that the Court would have a wide discretion to disallow all or part of incurred costs "on the grounds that there was no, or little, utility in their expenditure ".These were contempt proceedings against a seemingly insolvent defendant.

Absurd budget figures , high or low , are always to be avoided . See the criticisms levelled at one party in **FINDCHARM V CHURCHILL GROUP (2017) 1108 (TCC).**
The defence in FINDCHARM was described as something from the 1970s, with undeniable points not being conceded. The modern litigator must be precise and selective. In **HARRATH V STAND FOR PEACE LIMITED (2017) EWHC 653 (QB)** Eady J pounced in paragraph 13 of the judgment upon solicitors correspondence (no doubt fired off on instructions from their client). This caused serious distress to the claimant and was plainly an aggravating factor. Since I came across this decision the SRA published formal guidance warning against intemperate language (August 2017).
Incidentally, the case is interesting on another front. In a claim limited to £10,000 the highly experienced Judge proceeded to award £140,000 in damages! The Judge relied upon CPR 16.3 (7) which makes clear that the Court is not constrained to only give judgment for the amount sought by the claimant.

The Appeal Court again upheld an order penalising a defendant on account of conduct in **MANNA V CENTRAL MANCHESTER NHS TRUST (2017) EWCA Civ 12.** The Trial Judge had awarded the claimant indemnity costs for the final 5 months of the litigation.

This was because she regarded the defendant as having taken an unreasonable stance as to the quantum of the claim. It was a clinical negligence action. The case advanced by the defendant was found to have caused distress to the parents of the victim and to have lengthened the duration of the trial.

Yet another topical authority is **PERRY V RALEY SOLICITORS (2017) EWCA Civ 314** where the 8% Judgment rate for interest was awarded on damages because the defendant (or their insurers) dragged out the proceedings and unbelievably admitted breach of duty 2 days before trial. Worse, every conceivable defence was advanced.

Yet another big decision was that of Lord Justice Jackson and Lord Justice Briggs in **THAKKAR V PATEL (2017) EWCA Civ 117** . The claimant took proactive steps to arrange a mediation. The defendants “dragged their feet and delayed for so long that the claimants lost confidence in the process and closed it down " (paragraph 27). This was unreasonable and so the Appeal Court upheld a tough costs order compelling D to pay 75 % of the costs of the claimant despite the fact that C had failed to beat an offer made by D (paragraph 20). Jackson LJ cited 2 authorities, namely **Trustees of Stokes Pension Fund v Western Power Distribution (Southwest) Plc [2005] EWCA (Civ) 854; [2005] 1 WLR 3595,** and **Owners and/or Bareboat Charterers and/or Sub Bareboat Charterers of Samco Europe v Owners of MSC Prestige [2011] EWHC 1656 (Admlty**). The effect of these authorities is that where a purported Part 36 offer under the pre-April 2015 CPR is withdrawn, the crucial question is whether the offeree acted reasonably or unreasonably in failing to accept the offer while it was on the table. In both of those cases, the claimants acted unreasonably. Accordingly, the court made costs orders favourable to the defendants.

In **BALLARD V SUSSEX PARTNERSHIP NHS FOUNDATION TRUST (2018) EWHC 370 QB)** Foskett J had to decide what costs were payable by a claimant to the defendant.A first Part 36 offer was made by the defendant but was withdrawn a year later . A revised , reduced offer was made the same month , in February 2017. At trial the claimant failed to beat any of the offers. The Judge ordered the claimant to pay costs from the date of the first offer made way back in January 2016.On Appeal , the Court allowed the claimant all of her costs up until the date when the later Part 36 offer relevant period expired in March 2017.Thereafter , she was liable to pay the defendant costs .There is an enormous difference between withdrawing and varying a Part 36 offer.

In **OPTICAL EXPRESS LTD V ASSOCIATED NEWSPAPERS LTD (2017) EWHC 2707 (QB**) the High Court abandoned conventional Part 36 principles where C accepted a Part 36 offer out of time, having initially rejected it as derisory.Absent a principled explanation for the change of heart, it was inferred that C had belatedly reappraised the offer, something that should have been done at a much earlier date. The conduct of the claimant was held unreasonable. C got costs up to the point when it ought to have taken the offer. Thereafter it was to pay D and on the indemnity basis. Warby J observed, relying upon **MEDWAY V MARCUS (2011) EWCA Civ 750,** that a defendant confronted by a high claim of perceived low value would best be protected by making an offer without prejudice save as to costs.

In **LAKHANI V MAHMUD EWHC 1713 (Ch)** the defendant was denied relief from the Draconian sanction that is CPR3.14; no budget, no costs. The budget was served but one day late.The decision of the District Judge was upheld on appeal by Mr Daniel Alexander QC sitting as a Deputy. Astonishingly , no mention was made of the fact that in the infamous **MITCHELL** decision , where the claimant was similarly refused relief , the defendant was also guilty of serving their budget one day late. That lapse, Elias LJ said at the hearing, was De Minimis and was immediately forgiven. Delay in seeking relief did for the defendant. Always issue an application for relief on the day default is spotted.Never forget **BRITISH GAS V OAK TRADING (2016) EWCA Civ 153.**

.At the other extreme HHJ Grant QC forgave an 11 day failure to file in **MOTT V LANG (2017) EWHC 2130 (TCC)** where a technology glitch was the cause of the lapse.He did comment adversely upon the absence of a witness statement from someone within the IT department; direct evidence is best evidence.

Conduct was addressed in the seminal authority on relief from sanctions, **DENTON V WHITE (2014) EWCA Civ 906**. Everyone should pay regard to paragraphs 39-43 inclusive. .”Heavy costs sanctions “should be imposed where there is an unreasonable failure to agree extensions or to wrongly oppose applications for relief (para. 43). The costs sanction could go beyond the costs of the application itself.Conduct is addressed at CPR 44.3 (1) (b) which bans the court from allowing the recovery " of costs which have been unreasonably incurred" , regardless of whether they are on the standard or indemnity basis . What is counter - intuitive is that the innocent party could be penalised for having

taken an unreasonable stance against the party in default. Do not seek to exploit minor lapses or else you will be paying the costs!

It was the failure to respond constructively to settlement efforts which lead to the receiving party forfeiting their right to costs in **CZ (Human Rights Claim:Costs) 2017 EWFC 11(** see paragraph 66). The claimants “were ostensibly unreceptive “said Cobb J. .The classic route to indemnity costs was helpfully considered in detail by the Appeal Court in **WHALEYS (BRADFORD) LTD V BENNETT (2017) EWCA Civ 2143**.

A fundamental tenet of civil procedure is that a party who acts improperly, be they claimant or defendant, winner or loser , can be punished in costs and the most extreme economic sanction is an order to pay indemnity costs . This is exemplified by the facts of **WHALEYS,** an everyday story of dodgy Defendants. The Defendants failed to pay damages awarded against them.The Defendants were deliberately obstructive when enforcement steps were taken .Ultimately , the award was honoured . The claimant sought more than the normal fixed costs due for the 3 scheduled oral examination hearings. The Judge refused to award indemnity costs because many debtors try to avoid paying up and “I have seen more sophisticated attempts to avoid judgments than this “at para 25.

Drawing upon **EXCELSIOR V SALISBURY (2002) EWCA Civ 879** where it was explained that the critical requirement was “some conduct or some circumstance which takes the case out of the norm “. " the Court of Appeal did award indemnity costs.
.