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Commercial Newsletter – June 2023

Great oaks from little acorns grow.

Introduction by Francis Kendall, Joint Head of the Commercial Team at Kain Knight.

It was late 2017 when I took the decision to leave the partnership where I had worked for over 15 years for various reasons with no plans for the future save for a desire to stay in legal costs and to remain the master of my own destiny. Once notice periods and restrictive covenants had passed, I was approached by Kain Knight's CEO, Matthew Kain, in early 2019 to be part of a joint venture within the business to bolster the Commercial Costs capabilities of the firm. It was the perfect solution, enabling me to service my existing client base of city and niche practices in and around London and the Southeast, and to grow from there.

Kain Knight has always had a solid reputation for Commercial Costs expertise. My co-Joint Head of the Team, Chris Butler, has more than 35 years' experience, and recently prepared one of the largest bills ever seen by the firm, £18m. Between us we have one of the most capable commercial costs teams in the UK, whose meticulous and diligent approach enables us to deliver a highly specialised service which repeatedly yields exceptional results for our national client base.

Since joining the group, I've been able to further strengthen the team with several key appointments. Initially, Ben Chowdhury and Kelly Line, both of whom I had previously worked alongside, and both of whom I have the utmost respect for. Another "Ben", Ben Wilson, joined us in later 2019, and whilst many organisations were struggling with the lockdown way of working, the team thrived because our vision for a relaxed home/office, or life/work, balance already established in advance of forced home working.

Increasing instructions, particularly in highly complex and long-running commercial costs disputes, led to the recruitment of another former colleague in early 2023, Tom Spanyol. This latest appointment means that Kain Knight now have 14 commercial costs specialists, and as the costs market becomes increasingly sophisticated, Kain Knight continues to evolve in terms of both its service offering ad growing team of costs lawyers.

"ChatGPT, write me an article on AI in the legal industry."

By Benjamin Wilson, Senior Associate.

It would not be too surprising if most professionals in the UK were still under the impression that Artificial Intelligence (AI) was something seen in the movies and only talked about by the younger generation or tech enthusiasts. Whilst not necessarily incorrect, the world of AI is certainly growing, with the UK ranked third in the world for its research and innovation in AI, and UK based law firms and practices either investing in the area or even already utilising AI software.

Since the launch of ChatGPT, an AI Chatbot developed by OpenAI at the tail end of 2022, you may have already seen viral social media posts about the software that can almost instantly prepare detailed responses and answers to an incredibly vast array of sectors.

For example, the chatbot can write computer programmes, draft essays on a specific topic and even write song lyrics or compose music. Whilst the AI is not perfect and will certainly need refining, this is only the free service and OpenAI has already launched a professional service, which will again increase its capabilities and functionality. It is entirely reasonable to remain sceptical about the ability of AI, however, OpenAI's valuation has increased to an estimated $29 billion following the release of ChatGPT, showing this is not just seen as a flash in the pan.

Specifically on the legal front, Allen & Overy have recently introduced an AI chatbot, much like ChatGPT, to assist lawyers with drafting merger and acquisition documents and memos to clients. The tool utilised by Allen & Overy was developed using similar technology created by OpenAI and is available to all lawyers within the firm.

Law firms investing in legal technology is nothing new and automation has always been seen as a way of freeing up time to be spent on recoverable billable tasks. Tasks deemed to be administrative are frequently challenged on costs assessments, so irradicating work of this nature, so as to open the door for billable tasks seems like an obvious way of increasing profitability and recovery levels on any assessment.

Whilst there will be a lengthy transition period and, of course, AI is certainly not going to save money straight away or produce documents superior, or even akin, to a highly skilled and experienced lawyer. However, this is just one example of the legal sector already starting to dip its toe into the AI world. Law firms have always looked for ways to increase efficiency and profitability and the introduction of word processing software, with spell checking and the ability to edit without tipex, was seen as an incredible tool for achieving this and the next leap into AI should be viewed no differently.

It is not just magic circle firms investing in AI, as Search Acumen, a property data provider for conveyancers, has also recently begun trials of ChatGPT into their existing AI portal to assist and improve the efficiency of the conveyancing industry. The introduction of AI into their existing database aims to automate parts of the conveyancing process by answering questions and queries instantly. Again, whilst this is only in the beta stages, these are simply two examples of AI entering the legal market in two distinctly different ways.

From a costs perspective, who knows how and when AI will encroach into the domain of a Costs Lawyer, but similarly to the transition from four coloured pens, paper files and typewriters to electronic files, case management systems and the electronic Bill of Costs, there will be significant developments in the foreseeable future. Who even knows how, or if, the use of AI will be chargeable, but this is simply something to ponder at this moment in time and, maybe what is most exciting (or concerning, depending on how you view it), is that this is inevitably just the start.

Brierley v Otuo & Ors [2023] EWHC 275 (SCCO)

By Kelly Line, Costs Lawyer

Costs Judge Nagalingham recently refused the Defendants' application for the Claimant to redraw their Bill of Costs on the grounds that it failed to identify details of individual fee earners and, as a result, was "intolerably opaque".

The Defendants' application argued the "Claimant's Bill of Costs is miscertified as to accuracy and completeness insofar as it fails to identify the various fee earners by name, status (qualification and number of years post qualification experience) and hourly rate claimed by each fee earner for their work and identifying those works claimed accordingly". Therefore, the Defendants "are unable to provide any points of dispute to individual costs until such details are provided in a redrawn Bill of Costs".

Consequent to the application, the Claimants proceeded with serving an amended Bill of Costs. Although the Claimants did not specify the reason for amending the Bill of Costs, Costs Judge Nagalingham believed that it was obvious that the application had prompted the amendment. The amended Bill of Costs contained, within the narrative, the name, status and qualification of four solicitors (three of whom were partners) and their respective dates of admission to the roll of solicitors.

The question thereafter was whether, within the terms of the application as presented, the amended Bill of Costs was compliant given the Court of Appeal guidance following the case of AKC -v- Barking, Havering & Redbridge University Hospitals NHS Trust [2022] EWCA Civ 630.

The Defendants took issue with the Claimant's failure to stipulate how many years of post-qualification experience each solicitor had, alleging that one of the fee earners had in fact spent a period of time, post qualification, working for an insurance company in a capacity that would not count towards his post qualification years of experience. In response, counsel for the Claimant, confessed to being caught off guard by this allegation and argued that it did not form part of the application before the court nor the evidence presented in support.

Having reviewed the Court of Appeal's guidance with respect to paper Bills of Costs, the Judge was satisfied that the amended Bill of Costs was compliant in providing the name, status, qualification and date of admission to the roll of solicitors. It was also entirely a matter for the Defendants to raise, in their points of dispute, the argument that a fee earner's actual years of post-qualification experience is not commensurate with the hourly rate being sought.

The Defendants further argued that the format of the Bill of Costs was incorrect on the basis that it included work which post-dated 6 April 2018 and therefore an electronic bill should have been served for such work. In response, the Claimant relied on paragraph 5.1(a) of PD 47 noting that the underlying litigation, from which the order for costs originates, was not a Part 7 multi-track claim and, as a result, it is for the receiving party to elect whether to present the costs claim in an electronic or paper Bill of Costs.

Judge Nagalingham held that "Accordingly, on all limbs, of this application to redraw the bill, I find in favour of the receiving party and the application is therefore dismissed. There are no procedural irregularities that would otherwise compel or convince me that the latest version of the bill of costs needs to be redrawn and re-served". He also reserved the costs of the application to be addressed at the conclusion of the detailed assessment.

Key Points

In addition to the findings in AKC, this case further tightens the belt of what information is necessary and required when preparing a Bill of Costs.

Providing the name, status, qualification and date of admission to the roll of solicitors is sufficient detail to be included in the Bill of Costs. It is not necessary to scrutinise the fee earner's CV or determine the post-qualification experience in advance of preparing a Bill. If necessary, this is a point to be raised within the Points of Dispute and is certainly not a reason for the Bill of Costs to be redrawn.

This case will, no doubt, assist in deterring paying parties making unnecessary applications for the Bill to be redrawn.

DEUTSCHE BANK AG -v- SEBASTIAN HOLDINGS INC. AND ALEXANDER VIK: WAS IT WORTH IT?

By Ben Chowdhury, Managing Associate.

The Case of Deutsche Bank AG -v- Sebastian Holdings Inc & Alexander Vik brings about a number of key points to consider when entering the realms of a detailed assessment.

The underlying claim was heavily contested and involved Deutsche Bank ("DB") seeking to recover losses resulting from a breach of contract from Sebastian Holdings Inc ("SHI"), a company incorporated in the Turks and Caicos Islands. Without delving too much into the detail, the claim against SHI was for damages relating to the operation of accounts maintained by SHI with DB for trading in foreign exchange, equities and other financial products. Ultimately the court found in favour of DB and awarded it just over $243million and ordered that SHI to pay 85% of DB's costs of the action on the **indemnity basis**.

Alexander Vik ("AV") was the sole director of and shareholder of SHI and was found to have controlled the proceedings. As such, DB successfully sought permission for AV to be joined as a party to the proceedings (for the purposes of costs only) and an order was made that AV was to pay DB's costs award against SHI.

There was no doubt this was a huge and hard fought case and, as such, SHI was ordered to pay DB £32million plus non-recoverable VAT of just over £2.5million by way of a payment on account of costs.

To demonstrate the size of the matter, DB's disclosure involved the manual review of 1.5million documents with the parties serving 54 statements of witnesses of fact. 40 experts' reports were also prepared which ran to over 6,500 pages. Written opening submissions ran to over 1,700 pages, with written closing submission running to over 2,700 pages. The judgment itself was a staggering 428 pages. Both DB and AV instructed highly regarded law firms Freshfields Bruckhaus Deringer LLP and Brecher LLP respectively who, in turn, instructed significant counsel teams.

The Detailed Assessment Process

The process began in 2017, shortly after the Court of Appeal refused AV's permission to appeal the non-party costs order, where DB requested directions in relation to the Bill it wished to serve. DB submitted at the directions hearing that *"to produce a detailed bill which is compliant with the information specified and contained in PD47 <u>could take up to two years and cost DB approximately £2.5m</u>"* and also expressed concern that it would not recover those costs from either SHI or AV.

Therefore, DB sought directions for the detailed assessment be heard in 2 tranches:

1. Preliminary issues, to include fees of experts and counsel, which would be subject to separate Points of Dispute and Replies;
2. Followed by a hybrid bill which would be prepared in three parts, divided chronologically with scope for separate Points of Dispute and Replies to each part.

Senior Costs Judge Gordon-Saker rejected this approach as he rightly stated that a paying party is entitled to know at the outset what is claimed. He therefore made standard directions for the full Bill of Costs, Points of Dispute and Replies. He listed the Preliminary issues for 15 days with a further 30 days for the remainder of the assessment.

The Costs Claim

The Bill of Costs was served a little over a year later in January 2019 in the sum of £62,105,855 of which **£53,388,736** was the the 85% which AV was liable to pay.

Similar to the underlying proceedings, the detailed assessment process was also unsurprisingly huge. The Bill of Costs contained 1,577 items in the chronology, 283 items of disbursements totalling over £30million, 40 document schedules (one for each month) that ran to over 2,000 pages and included, individually, seven schedules over £1miliion and fifteen schedules between £500,000 and £1miliion.

AV's Points of Disputes, served in July 2019, were 289 pages in length and, although SHI was served with a Notice of Commencement, it did not play a part in the detailed assessment proceedings. The Replies were served in December 2019 with the composite document becoming 483 pages in length.

The first hearing took place over 3 days in February 2020 concerning the first 3 issues raised in the PODs:

- Rate and period of interest that should be allowed on DB's costs;

- Scope of the Costs Order; and
- Exchange rate that should be used in relation to the sums claimed in foreign currency.

In respect of the first point, it was ordered that DB was entitled to interest at the Judgement Act rate but, due to the delay in pursuing detailed assessment, Senior Costs Judge Gordon-Saker disallowed 12 months interest in addition to the period which DB had already conceded. On the second point, it was ordered that AV was not liable to pay costs that fell within certain interlocutory costs orders as they did not fall within the scope of the non-party costs order. On the third point, Senior Costs Judge Gordon-Saker agreed with AV that where DB had paid disbursements in USD$ the appropriate exchange rate was the exchange rate at the time of payment rather than when the Bill was drawn.

DB also made an application for an adjournment of the remainder of the DA so it could put in further particulars of the work done by DB in the form of summaries for each month, which was ultimately refused.

The remaining preliminary issues were heard remotely in April and May 2020, following which AV served further Points of Dispute relating to Senior Costs Judge Gordon-Saker's decision that certain other costs, including DB's in house fees, were properly recoverable, subject to reasonableness. Further hearings were also attended in November, December 2020 and March 2021.

The remainder of the hearing days were taken up with the chronological part of the Bill of Costs (a bespoke approach previously approved by the court) and the 40 document schedules, some of which took less than a day to assess (with the larger schedules taking about 2 days each). In addition, amended and re-amended schedules were served by DB. DB's Costs Lawyer took the court through the tasks attended to in each month and through the documents they were able to identify from the documents provided to them. Senior Costs Judge Gordon-Saker commented that "*this was a painstaking exercise"* in what he referred to a number of times as *"forensic archaeology"*. Criticisms were also made on how the files were stored as they were in no particular order, which precluded any structed pre-reading.

As a result, the detailed assessment lasted an extraordinary 97 days, over double the 45 days originally set at the directions hearing. The approach taken by the parties was criticised by the Senior Costs Judge, including the forensic archaeological approach, as well as AV's approach to challenge virtually all items in the Bill of Costs. The main issue raised by the Senior Costs Judge, was the fact the parties did not settle once they had sufficient indication of the court's direction of travel.

So what was the result? Following a lengthy (and very costly) detailed assessment, DB managed to recover just over **£36.5million,** only £2million more than the payment on account made in 2014. This was a reduction of over 32%, or £16.8million, despite the costs being assessed on the indemnity basis.

Senior Costs Judge Gordon-Saker also made an order that AV pay 70% of DB's costs of the detailed assessment on the standard basis to be summarily assessed.

Taking into consideration the cost of preparing the Bill of Costs and the cost involved in the detailed assessment, it could be argued that DB would simply have been better off taking the payment on account in 2014, based on the end result in this particular matter

What are the key takeaways?

- The key takeaway is to undertake considered and periodic quantum analysis for the purposes of making meaningful and protective Part 36 offers in advance of the detailed assessment hearing commencing;

- Seeking directions pre-bill preparation is unnecessary unless the case is of significant complexity or requires court's direction, such as group litigation which includes common costs;
- The exchange rate to be applied on costs incurred in another currency is that on the date of payment;
- To ensure the files are in order, with supportive documentation (such as attendance notes) available to the court on assessment and to ensure the files have been properly prepared for detailed assessment in order to assist the court rather than to frustrate;
- Once the parties have an indication as to the direction of travel arising from the decisions made by the court they should use that information, and best endeavours, to try and settle the case;

Had AV made an offer (Part 36 or Calderbank) offer in the region of the payment on account already made, it would have been arguable that he would have been able to forego paying the detailed assessment costs of DB as well as being able to recover his undoubtedly significant fees from them, if he went on to beat his own offer.

In contrast, DB could have made a similar level of offer, in Part 36 format, in the knowledge of the state of its supporting papers prior to seeking directions. That or, had DB taken the time to organise it's documents in a manner which was easy to navigate, and found a way to avoid the "forensic archelogy" approach, it may have been able to ensure the costs claim was: presented in a more workable manner (i.e. with less cumbersome document schedules); and possibly achieved a better recovery level as a result. 32% is a significant reduction given that costs were assessed on the indemnity basis and any doubt was to be excercised in favour of DB

Now a question for the reader, was it worth it?

The Kain Knight City team are experienced in conducting high value and complex commercial costs claims through the detailed assessment process and have a long standing history in this field. Please get in touch and our commercial team will assist you in maximising your recovery or protecting you from ongoing costs in an assessment should your client be the paying party.

Von Westenholz & Ors v Gregson & Anor [2022] EWHC 3374 (Ch)

By Kelly Line, Costs Lawyer.

Underlying Claim

Michael Saunders, the first claimant, believed he had invested £150,000 in the purchase of 80,000 shares in in All Star Leisure Limited ("ASL") and All Star Leisure Group Limited ("ASGL"), both of which formed the ASL Group, run by his son-in-law, Mark Von Westenholz. His intentions were that his family members, the other Claimants, would be the beneficiaries of the shares. However, the shares were never issued to the Claimants and remained solely in Mr Westenholz's name.

Meanwhile, without authorisation, Mr Westenholz, withdrew significant sums totalling around £2,000,000 from the ASL Group without authorisation. In 2018, the ASL Group paid a dividend of £400,000 in respect of the 80,000 shares. However, given that the shares remained solely in Mr Westenholz's name, the funds were retained by ASL Group as a result of the money owed by Mr Westenholz to the company.

Given that the Claimants were the intended beneficiaries, Mr Saunder's brought a claim seeking equitable compensation against the companies and non-executive directors of the ASL Group. The pleadings were later amended to not only amend the parties (both Claimants and Defendants), but to materially change the case pleaded. In particular the amended pleading included the *Guardian Trust* principle.

As a result, eight separate causes of action were pleaded.

In the Judgment handed down on 21 November 2022, although the Claimants had failed in respect of six of the eight actions pleaded, Robin Vos found the Defendants liable in the sum of £400,000 by way of equitable compensation. Due to the parties being unable to agree the form of the order, further judgment on the issue of costs was sought.

One of the key areas of dispute between the parties was that the Claimants were relying on the usual consequences of Part 36, having made two offers which were lower than the final award, and sought costs on the indemnity basis. Whereas the Defendants, unsurprisingly, argued that costs should be assessed on the standard basis.

First Part 36 Offer

In October 2018, a Part 36 offer of £150,000 was made prior to the issue of proceedings. Significantly, the offer was only made on behalf of one of the Claimants and detailed the proposed Defendants as ASL, the ALSG and the (current) Defendants.

The Defendants argued that the offer should be disregarded on the basis that "*the proceedings which were contemplated in 2018 were different proceedings. Not only were the parties different…. but the claims were also materially different to the proceedings which were ultimately issued in 2020*".

Vos J accepted the Defendants' argument and agreed that *"the offer was made on behalf of different parties to a potentially different claim. It cannot be said to be an offer to settle the claim that was made in the current proceedings"*. He concluded that the offer had no impact on the proceedings.

Second Part 36 Offer
In July 2020, a further Part 36 offer of £120,000 was made shortly after proceedings were served and before the Defendants filed their Defence. Vos J confirmed the offer *"was clearly a valid Part 36 offer in relation to the present proceedings and should therefore in principle give rise to the consequences set out in CPR Rule 36.17 given that the judgment against the Defendants was more advantageous to the Claimants than the proposals contained in the Part 36 offer (CPR Rule 36.17(1)(b)). Those consequences follow unless the court considers that it is unjust for them to do so".*

The Defendant argued that it "*would be unjust to give effect to the consequences set out in CPR Rule 36.17 since, at the time the offer was made, the Guardian Trust claim had not been pleaded and the focus of the claim was on the claims based on economic torts which all failed".*

Whilst Vos J agreed with the Defendants that the *Guardian Trust* claim had not been pleaded at the time the offer was made, the court had in addition *"found against the Defendants on the basis of a breach of their fiduciary duties towards the Claimants"* which formed part of the original pleaded claim. However, given that the *Guardian Trust* claim had not been pleaded at the time of the offer, that was a factor for consideration when deciding the extent of those consequences.

Vos J confirmed that *"as far as costs are concerned, the first consequence is that the Claimants are entitled to all of their costs from the expiry of the relevant period (in this case from 18 August 2020) on the indemnity basis. In principle this means the whole of the costs without considering any reduction from CPR Rule 44 (Webb v Liverpool Women's NHS Foundation Trust [2016] EWCA Ci 365). Instead, the Defendants must show that requiring payment of all costs on the indemnity basis is unjust".*

"As Briggs J noted in Smith v Trafford Housing Trust [2012] EWA 3320 Ch at [13], the burden of showing injustice is a "formidable obstacle to the obtaining of a different costs order" in the light of the purpose of Part 36 to promote compromise and avoid unnecessary expenditure of costs and court time".

Vos J concluded that *"the fact that the Guardian Trust claim had not been pleaded at the time of the Part 36 offer is not a reason for denying the Claimants all of their costs on the* *indemnity basis… given that the Claimants would have been successful even if that claim had not been pleaded".*

The second consequence was that the court should order interest on the costs at a rate not exceeding 10% over base rate. Vos J observed that the Defendants had not, in any way, acted fraudulently or dishonestly and that had the *Guardian Trust* claim been pleaded at the time it may have made a difference to whether the offer was accepted. However, he ultimately accepted that *"the Defendants had all the information available to them in order to make a decision at the relevant time whether to accept the offer based on the claim as it was then pleaded and that offer was made at a relatively early stage"* and concluded that "*this is not a case…where the maximum interest should be awarded. Instead, I will award interest on costs at 4 per cent above base rate (from time to time) from 18 August 2020 up to the date of this order"*.

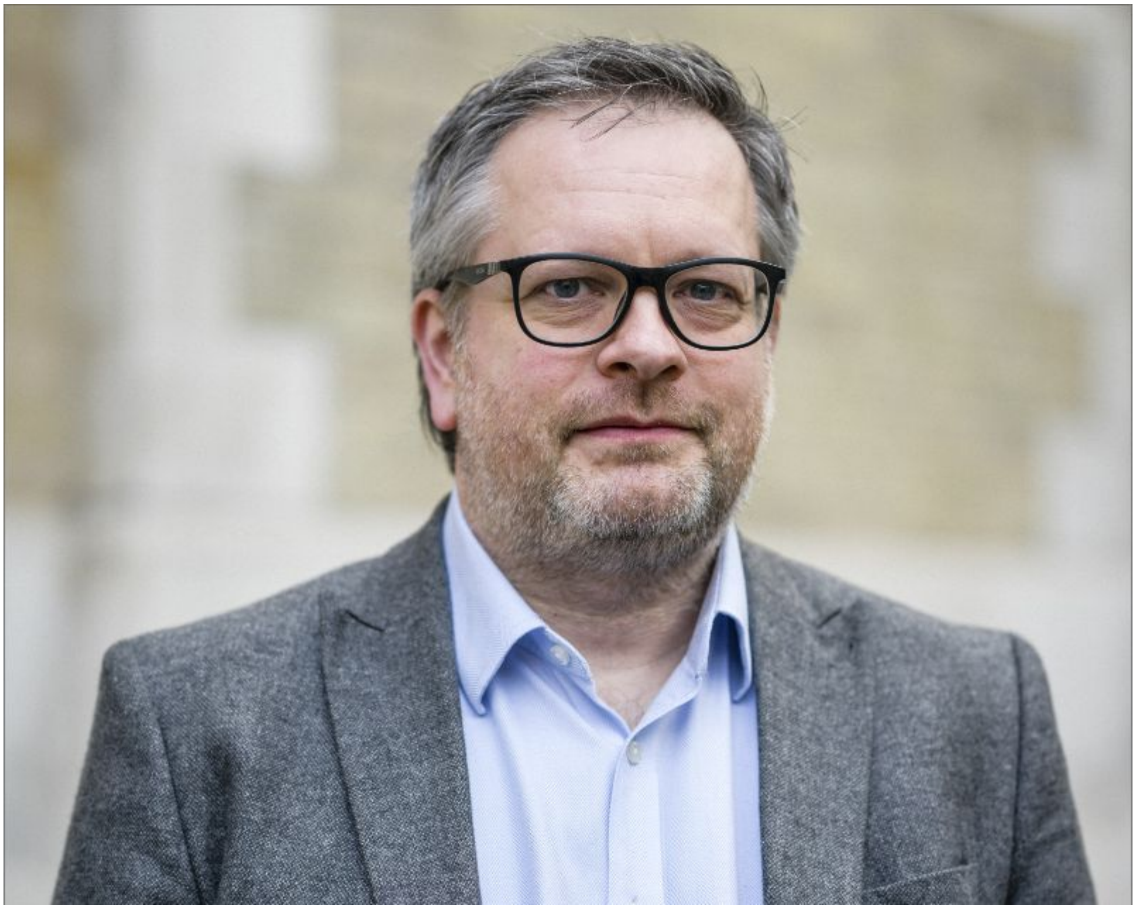
The third consequence considered was whether the Claimants were entitled to interest on equitable compensation at a rate which, again, did not exceed 10% over base rate. Based on the observations already made, Vos J confirmed that the Claimants were entitled to 4% over base rate from time to time.

The final consequence considered was whether the payment of the additional amount of 10% of the amount awarded i.e. £40,000 was unjust. Vos J concluded that there was no reason why, taking into account all of the circumstances, it would be unjust, having failed to beat the Claimants' Part 36 offer, for the Defendants to pay the additional amount.

Key Points
Although making a Part 36 offer early on in the proceedings can be beneficial it is not uncommon for the landscape of the litigation to change. In the event pleadings are amended to a level which would constitute an early offer being invalid in the current proceedings, careful consideration and assessment of the offer should be undertaken.

As evidenced, failure to accept a Part 36 offer, especially made early on in the proceedings, can be a costly decision. When receiving a Part 36 offer it is imperative to consider not only the claim as pleaded but to also consider *"all the information available"* in a wider context. Although the offer was made before pleadings were amended and, in effect, was not reflective of all the causes of action, the fact that the Claimants had succeeded on one of the original aspects of their pleaded case was enough to give effect to the consequences set out in CPR Rule 36.17.

Spotlight on: Thomas Spanyol, Senior Costs Lawyer



“Almost 24 years ago, I secured a job as a “taxation clerk”. At the time, I had little idea about what that meant and no idea where the path I had started on would lead me. Given that the Civil Procedure Rules had recently been introduced, it appears that my employer at the time was also a little unsure of my role, having yet to get to grips with the *new* “detailed assessment” terminology!

It has been fascinating to experience how the legal costs industry has developed over this period. In the beginning, as I started filing papers at Court and undertaking general clerking duties, costs was a growth sector with the advent of bill drafting becoming a recoverable cost. I was learning the art of becoming a Costs Draftsperson throughout the Costs Wars of the early 2000s before going on to qualify as a Costs Lawyer in 2008. I was also fortunate enough to have been exposed to all types of costs cases during these early years, before focusing on costs issues arising in commercial litigation and arbitration.

Working for the majority of my career at a City of London based costs consultancy, I was appointed to the Partnership in 2011 and ran the Commercial team there together with Francis Kendall prior to his departure to set up Kain Knight’s City offering in 2018. I continued to run the Commercial team, building relationships with a number of City firms as well as becoming responsible for the finance side of the business, together with the Managing Partner and Finance Manager.

So why Kain Knight? The opportunity to reconnect and work again with some of the best costs professionals I have worked with during my career to date made this an easy decision. Having spent a lot of time in my previous role being involved in management of a business, I'm now enjoying being able to focus on core work and delivering projects with my new colleagues - exactly what I was looking for with the move."

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Twitter LinkedIn enquiries.city@kain-knight.co.uk