

“Consequential”: a lesson from the High Court in post-trial costs issues

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In this article, Colin Campbell of Kain Knight explores the evolution of post-trial costs practices in the UK, particularly in light of the Civil Procedure Rules (CPR) implemented in 1998. The article looks into the concept of “consequential”, where post-trial hearings determine the allocation of costs, reflecting the court’s discretion under CPR 44.2. The article also examines the judgment in *Barry v Barry* [2025] EWHC 819 (KB), highlighting its significance in guiding practitioners through disputed costs issues.

In days of yore when the judges of the courts of Queen Victoria and her regal successors were giving judgment, the invariable practice was for the outcome of the trial to be delivered *extempore*. The judge gave the result to the parties orally, while counsel and their instructing solicitors furiously scribbled down what was being said as best they could. Times changed and those concise, pithy and succinct decisions have been replaced by lengthy reserved judgments, which the judges’ clerks deliver confidentially to the parties by electronic means. That way, the expense is avoided of an in-person court attendance by counsel and their solicitors, merely in order to find out the result.

Such a practice, however well intentioned, is not without its problems. Until the implementation of the Civil Procedure Rules (CPR) in 1998, the invariable rule when the costs of the action fell due for consideration at the conclusion of the trial was that they should “follow the event”, that is to say that the party receiving the cheque would be the winner and the writer of the cheque would be the loser. Beyond that, the court would seldom undertake a minute *ex post facto* examination not only of the matters upon which the winner had succeeded, but also those upon which they had failed, with the intention of making appropriate costs adjustments in the loser’s favour to reflect those factors.

That practice has changed. CPR 44.2 deals with the “Court’s discretion as to costs”, whether costs are payable by one party to another, and that in

deciding what order (if any) to make about costs, the judge will have regard to:

“(4)(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful...”

It follows that while a party who is the recipient of the cheque may appear to be the winner, if the recovery has been much less than 100%, the loser is likely to ask the judge to undertake a review of any matters where the defence has been successful, with a view to adjusting the costs order. Thus, has developed the practice of “consequential”, that is to say, a post-trial hearing to decide what, if any, costs order should be made.

It is in this context that a body of case law has developed in which the court has had to address competing arguments about which party has been the real winner, in order to decide whether the costs should, or should not, “follow the event”. Where that happens, dealing with “consequential” can, itself, become a mini-trial, with the costs of the action and arguing about who should pay them sometimes dwarfing the sums originally in dispute.

For a recent example of “consequential” at play, the judgment of Dias J in *Barry v Barry* [2025] EWHC 819 (KB) has provided helpful guidance, in no little part due to his having taken a leaf out of the book of the Victorian judges, in his addressing a full house of disputed costs issues in clear and succinct terms.

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Barry is a sad case. It involved an acrimonious and contested trial in a contract dispute between two parents and their son. Costs were payable by the son on the indemnity basis. However, other matters were far from agreed. In issue and in dispute as “consequential” were whether the parents could increase their costs budgets under CPR 3.15A, the application of CPR 36.17(4) in respect of their offers to settle, interest on costs and the level of any payments on account under CPR 44.2(8).

The case had been subject to a costs management order made at a costs and case management conference (CMCC), which meant that the parties had filed and exchanged costs budgets under CPR 3.13, and the court had approved their expenditure in costs going forward. However, in respect of disclosure and witness statements, Mr and Mrs Barry had overspent and sought post-trial upwards variations under CPR 3.15A of £22,650 and £4,800 respectively.

Their application failed for lack of promptness, due to their delays in making it (twelve months and four months respectively), but the Barrys had another string to their bow. They deployed Practice Direction 3D at paragraph 13 contending that their son had been:

“... behaving oppressively in seeking to cause the applicant [his parents] to spend money disproportionately.”

That contention also failed. In deciding whether their son’s behaviour overrode the Barrys’ lack of promptness, Dias J observed that “behaving oppressively” has no legal definition. His analysis was that the critical words in the PD were “... *seeking to cause*”, which meant having a deliberately targeted intention. That had not been the son’s motive. Leaving no stone unturned and taking almost every point was not trying to run up costs needlessly in order to coerce his parents. It followed that PD 3D did not rescue their application to vary the budgets for disclosure and witness statements from defeat by the lack of promptness in making it, so the Barrys left court emptyhanded.

However, that was not the case so far as an increase for trial preparation and for the trial itself were concerned. A late amendment to the defence had increased the costs and caused the trial to overrun. These were “significant developments” under CPR 3.15A(1) in respect of which their application for a further £37,500 had been made promptly and was successful, at least to the tune of £27,500. The lesson was thus delivered: those who delay applying to vary their budgets under CPR

3.15A do so at their peril and are likely to fail. Those who apply promptly and can establish a “significant development” in the litigation, are likely to succeed.

The next “consequential” was Part 36. Dias J accepted that offers made by the Barrys were valid and that they had done better at trial. That meant that the CPR 36.17(4) entitlements as a starting point took effect subject to any disapplication or adjustment. Should that be the full additional sum of £75,000 under CPR 36.17(4)(d) or a lesser amount? In Dias J’s view, the purpose of the rule was to penalise an unreasonable refusal to accept an adequate offer and that the additional amount is “all or nothing”, unless injustice to the defendant will be caused by implementing the rule. On the facts, it was not unjust for the son to pay the full £75,000, no discretion reposed in the court to award a smaller amount, so £75,000 it was.

Interest on costs was however, a matter for the discretion of the court and enhanced interest at 10% above base rate potentially payable under CPR 36.17(4)(a) and (c) was not the default position. The factors relevant to that discretion were firstly, that the Part 36 offers had been reasonable and genuine, and secondly, the son’s conduct in having advanced a weak case which he knew would cause grave distress to his parents. However, the parties were private individuals and not institutions: 8% above base rather than the full 10% was a fair figure for the son to pay.

The final “consequential” was payments on account under CPR 44.2(8). The key point of embarkation was the principle that budgeted costs provided a reliable starting point because the case management process had held them to be reasonable and proportionate. That was not the case for incurred (unbudgeted) costs which were not subject to court approval and any payment should not only not exceed an estimate of the likely level of recovery, but also leave an appropriate margin for error. In between, there were the costs which had been varied upwards under CPR 3.15A but had not received the same degree of scrutiny that would occur at a CCMC. Finally, there was the point that costs had been awarded on the indemnity basis which was “of significance”.

Deploying these factors, Dias J presented his rulings in a useful tariff ordering that payments on account be in the following percentages:

- Incurred (unbudgeted) costs: 55%.
- Budgeted costs: 90%.
- Costs varied under CPR 3.15A: 80%.

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The judgment in *Barry* covers a lot of ground and is to be commended to practitioners since it sets out concisely and fully, and with reference to the relevant authorities, the principles which apply when the court is dealing with “consequentialists”.

There is, however, one curiosity. The court was willing to entertain the Barrys’ application after trial to vary their costs budget. Earlier case law, however, has established that where, as in *Barry*, an award of indemnity basis costs has been made, the receiving party is freed from the constraints of the last agreed

or approved costs budget, and that that is a good reason under CPR 3.18 to depart from it (see *Denton v TH White Ltd* [2014] EWCA Civ 906, Lord Dyson at paragraph 43 and *Lejonvarn v Burgess* [2020] EWCA Civ 114, Coulson LJ at paragraph 93). That begs a rhetorical question: if the indemnity basis order rendered the costs budget an irrelevance, why did the Barrys apply to vary it upwards? On the authorities, there was no need, but that is not to detract from the exemplary reasoning in Dias J’s judgment in his dealing with their application.

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