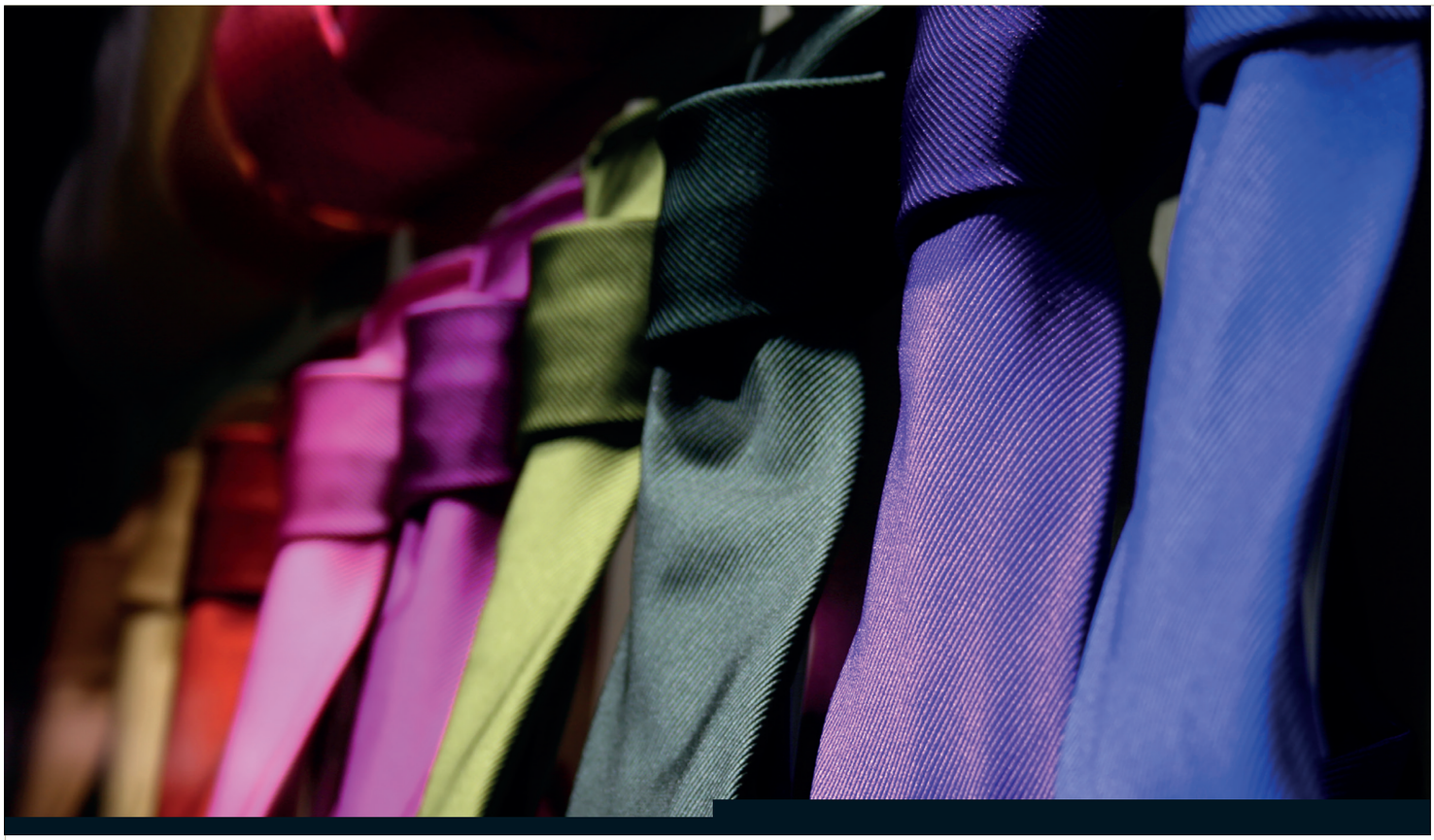
Smooth as silk

Dominic Regan on justifying the use of a KC and other current costs issues occupying the courts



Do not instruct leading counsel without first reflecting whether their appointment will stand up to close scrutiny. Many of my best friends are silks, and I bear them no malice. However, one needs to be careful about using them. Obviously, there are matters of great value and / or complexity that justify the use of a leader.

The current *Commercial Court Guide* published in 2022 makes the point that where you are represented by a silk, certain aspects of a case could be handled by a less expensive junior. Disclosure, budgeting and costs hearings spring to mind. See in particular Part D 7.1.

In April this year a new Supreme Court Practice Direction took effect. The court is keen for juniors to get some advocacy experience in our highest court. While being lead, it might be that a junior could address one discrete issue in an appeal. Where only a leader is to speak, that party must confirm to the court that consideration was given to the possibility of using a junior in some way.

It is an inevitability that the fees of leading counsel will be greater, sometimes far greater, than those of even a senior junior. Consider the recent judgment in *Saudi Arabian Airlines Corporation v Sprite Aviation* (2024) EWHC 797 (Comm) where at a costs assessment the only successful challenge made by the paying party concerned the fees of counsel. The winner had used a leader and junior. The judge held that only a junior should have been instructed in the substantive hearing, which would cut the cost from £22,000 to about £5,000.

Mrs Justice Yip, taking a welcome break surely from murders most foul, upheld a decision rejecting the expense of another leader in *Coram v D R Dunthorn & Son Limited* (2024) EWHC 672 (KB). A fatal mesothelioma case had settled for £75,000 a month before trial. The fee for Mr Harry Steinberg KC was abated to £25,000 plus a success fee of 27.5%, being half of fee marked on his brief delivered eight days prior to settlement. Deputy Costs Judge Joseph disallowed the fee altogether. It is noteworthy that there was no material before him from the instructing solicitor as to 'his thought process or his reasons for instructing' the leader. There was no evidence from junior counsel, Ms Gemma Scott, as to why and when she advised that a leader be taken onboard.

On appeal, Yip J (at paragraph 49) thought the absence of such evidence was properly taken into account when considering 'the significant and costly decision to instruct leading counsel'. She therefore concluded that the Costs Judge did not err in the exercise of his discretion.

On a practical, tactical note, do carefully record a note setting out what factors lead you to conclude a leader was justified immediately before instructing them. If it is at the instigation of your junior, get them to confirm in writing their reasoned advice. One will always want the best leader for the job, but it might be advantageous to use someone in the same set as your junior. Difficult costs issues as arose in *Coram* above might just be eased if you end up negotiating fees and any adjustment to them with one set of clerks rather than two.

MEDICAL REPORTS

It is intriguing to see how seemingly well-established arrangements in civil litigation can suddenly come under attack. It was over 20 years ago

that HHJ Michael Cook acknowledged the legitimacy of securing medical reports in injury cases through the medium of a medical agency. I wrote here last year about the judgment of HHJ Nigel Bird in *Northampton General Hospital NHS Trust v Hoskin*. He ordered the largest medical reporting agency in the country to provide a breakdown of two invoices it had rendered. Each invoice related to the fee of a medical expert, but claimed a total sum, within which the amount payable to the doctor was submerged. The judge considered that the paying party was entitled to see the apportionment of fees between doctor and agency so as to consider the proportionality of the charges levied by the latter. He made a stiff order stipulating that unless the medical invoices were disclosed within 14 days, both claims would be assessed at nil. Permission to go to the Court of Appeal was secured but the appeal was abandoned at the beginning of this year.

In *Aminu- Edu v Esure Insurance Company Limited*, a Central London County Court judgment handed down on 8 March, HHJ Saggerson has taken an identical approach in respect of a breakdown. Contrary to his description of himself as 'a judicial bonehead' (at paragraph 21) he delivered an elaborate 62-paragraph decision and did not pull any punches along the way.

Transparency was critical. He alluded to a 'micro-industry of unknown and unknowable commissions or referral or arrangement fees' which meant that litigation was pursued 'in the interests of an economic ecology far removed from the interests of justice or the protagonists'. By way of example he cited 'The racket that is claims for "hire charges"' which only served the interests of lawyers and insurance companies (yet oddly no mention was made of the hire providers).

At paragraph 18 he explained 'I do not consider it unreasonable that a paying party - even an insurance company - should know what it is paying for and to whom'. The fee in question was £2,916 for a very straightforward pain management report that 'cannot have taken long to prepare' in a claim that settled for £40,000. Absent a breakdown, the Judge awarded £750 plus VAT. He described the nil award (*Fox v Lancashire & South Cumbria NHS Foundation Trust*) as an unduly harsh sanction. With respect, the nil figure would only apply if the order of the court to disclose was disobeyed. I surmise that HHJ Bird (in *Northampton General Hospital NHS Trust v Hoskin*) approached the matter as one would when framing an 'unless order', seeking to provoke compliance.

HHJ Saggerson concluded by observing that to permit recovery of a global sum would 'allow medical referral agencies carte blanche to charge what they like' without any scrutiny or control by the courts. At time of writing, I understand that yet another judgment is about to surface supporting the disclosure line.

Some agencies are happy to disclose what they rightly charge for taking the necessary steps to set up and secure medical reports. Those that have baulked at disclosure are in an unhappy place. To see, as in *Aminu- Edu*, an invoice slashed by two-thirds does not look economically sustainable. Either they disclose, or they look at a radically different business model.

One suggestion floating around is that the credit hire model might be adopted, with the lay client entering into an arrangement with the agency direct. Significant disruption is on the horizon unless another case were pursued successfully to the Court of Appeal by a shy agency.

Indeed, the activities of external commercial providers in the civil litigation arena is causing concern to judges confronted with claims on a daily basis. I spoke in March to a number of district judges at their annual conference in London. A recurring complaint was the amount of court time used up by car hire and related credit hire claims. The suppliers are unregulated and frankly seen by some as parasites, feeding off what should be straightforward bumps and shunts.

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Turner J in *Kindertons Limited v Murtagh* (2024) 471 (KB) spoke wearily of 'another chapter in the continuing war of forensic attrition between motor insurers and credit hire companies' before upholding a non-party costs order against the credit hire company. His judgment is illuminating, as is an excellent note about the case written by counsel for the defendant / respondents Stephen Bailey. It is to be found on the website of Hailsham Chambers. The company 'had a very strong financial stake in the litigation', with any supposed benefit to the claimant in pursuing the claim for hire charges being 'all but illusory'.

A minor collision involving 'gentle contact' between two vehicles led to repair costs of £2,543.80, accompanied by the parties' combined legal costs of a tad under £100,000. One can see why the judiciary is fuming. Quite what is to be done,when and by whom is utterly uncertain; but I do sense a powerful appetite for reform in the same way that the dubious dealings of claims management companies were ultimately jumped upon by parliament.

LITIGATION FUNDING

Finally, on 19 March the Litigation Funding Agreements (Enforceability) Bill (see article, page 8) was introduced in the House of Lords (HL Bill 56). The succinct bill at clause 1(2) amends the definition of a damages-based agreement (DBA) to provide that an agreement, to the extent that it is an LFA, is not a DBA. The true stroke of genius is clause 1(4) which provides that the amendments are to be treated as always having had effect. The bill sailed through a second reading in April, but at time of writing it is unclear what the 4 July general election will mean for it.

The costs bar had been wrestling with the fallout from *PACCAR v Competition Appeal Tribunal* (2023) UKSC 28. By a majority of 4 to 1 it decided that litigation funding agreements in which the fees of the funder were calculated by reference to a cut of the damages recovered were in law damages based agreements. Statutory reform, if enacted, should hopefully bring an end to the utter uncertainty presented by *PACCAR*.

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