MLA

MEDIA LAWYERS ASSOCIATION

RESPONSE TO GOVERNMENT CONSULTATION IN RESPONSE TO THE GOVERNMENT COSTS PROTECTION IN DEFAMATION AND PRIVACY CLAIMS

INTRODUCTION

1. This response is submitted on behalf of the Media Lawyers Association ("the MLA") which is an association of in-house media lawyers from newspapers, magazines, book publishers, broadcasters and news agencies. A list of the MLA's members is set out in Annex 1.

QOCS AT ALL?

2. The consultation paper presupposes that some form of qualified one way costs shifting (QOCS) will be introduced in defamation and privacy claims. It is claimed that in doing so the Government will be implementing the recommendations of Lords Justices Jackson and Leveson. The consultation paper does not solicit views on whether it is necessary or appropriate to introduce any form of QOCS in such claims.

3. Before addressing the specific questions in the consultation paper, the MLA wishes to make clear its objection to any form of QOCS in principle. Its concerns fall under three heads:

   (a) In proposing to introduce some form of QOCS in addition to the costs provisions relating to any future arbitration scheme in section 40 Crime and Courts Act 2013 ("CCA"), the Government is going further than either Lord Justice Jackson or Lord Justice Leveson recommended and the consultation is therefore based on a false premise.

   (b) The introduction of QOCS will encourage unmeritorious claims to be brought and will have a chilling effect on freedom of expression.

(c) Policy should instead be directed at controlling the cost of litigation.

4. A False Premise

5. Lord Justice Jackson's recommendation that QOCS be introduced for defamation and related claims was premised on his view that *"[i]n many, but not all, cases there are strong policy reasons why the claimant should be protected against liability for adverse costs. This is because in the paradigm libel case the claimant is an individual of modest means and the defendant is a well resourced media organisation"*.[1]. Whether or not that premise is accepted, Lord Justice Jackson's view was that QOCS was the most cost effective way of *"achieving the intended social objective"*.[2]

6. It goes without saying that, at the date of Lord Justice Jackson's final report (December 2009) there was no Leveson Inquiry and no proposal for any sort of arbitration of the kind to which s. 40 CCA relates.

7. When the Government consulted on Lord Justice Jackson's proposals, its response to the consultation was that it was *"not persuaded that the case for [extending QOCS beyond personal injury claims] has been made out at this stage"*.[3]

8. The Government's reconsideration of the issue of QOCS in defamation and privacy claims has clearly – and admittedly – been prompted by the report of the Leveson Inquiry. Lord Justice Leveson's main proposal to provide costs protection for claimants and access to justice for those of limited means was an arbitration service to be provided by a new press regulator (Part K, Chapter 7, paras 4.43ff). The recommendation was that this service be free for complainants to use, save for a power to make an adverse costs order for the costs of the arbitrator if proceedings are frivolous or vexatious (para 4.46).

9. Lord Justice Leveson considered that both complainants and publishers could be incentivised to use this arbitration system through costs protection and penalties as follows (para 5.5):

I recommend that it should be open to any subscriber to a recognised regulatory body to rely on the fact of their membership and on the opportunity it provides for the claimant to use a fair, fast and inexpensive arbitration

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[1] Final report, chapter 32, para 3.7.
[2] Ibid. para 3.9
[3] *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations, The Government Response*, para 27.

service. It could request the court to encourage the use of that system of arbitration and, equally, to have regard to the availability of the arbitration system when considering claims for costs incurred by a claimant who could have used the arbitration service. On the issue of costs, it should equally be open to a claimant to rely on failure by a newspaper to subscribe to the regulator thereby depriving him or her of access to a fair, fast and inexpensive arbitration service. Where that is the case, in the exercise of its discretion, the court could take the view that, even where the defendant is successful, absent unreasonable or vexatious conduct on the part of the claimant, it would be inappropriate for the claimant to be expected to pay the costs incurred in defending the action.

10. This recommendation has been given effect, and indeed extended by providing strong statutory presumptions rather than simply leaving the matter to judicial discretion, in s. 40 CCA, which provides as follows (in summary). If a claim for libel, slander, breach of confidence, misuse of private information, malicious falsehood or harassment, which relates to the publication of news-related material, is made against a "relevant publisher", then the default position is that, if the defendant was a member of an approved regulator when the claim was commenced (or could not have been a member or it would have been unreasonable for the defendant to be a member) and the issues raised by the claim could have been resolved using the regulator's arbitration scheme, then the court must not award costs against the defendant. Conversely, if the defendant was not a member of an approved regulator when the claim was commenced (and could have been and it would have been reasonable to be a member) and the issues raised by the claim could have been resolved using the regulator's arbitration scheme, then the court must award costs against the defendant. In both cases, the court has a discretion to make a different order if it is "just and equitable in all the circumstances of the case".

11. The clear statutory presumption, therefore, is that publishers will be members of the regulator and that disputes will be dealt with through the regulator's arbitration scheme wherever possible.

12. If a publisher unreasonably fails to be a member of the regulator, then any claimant (regardless of means) who sues that publisher will have more than simple costs protection, since s. 40 CCA provides that the defendant must be ordered to pay the claimant's costs regardless of the outcome unless the claim could not have been resolved through the arbitration scheme.

13. If a publisher is a member of the regulator, then a cost free arbitration service will be open to the claimant and there will be no need to issue proceedings unless it has not been possible to resolve the dispute through the arbitration scheme.

14. Thus claims will only be issued if either (a) the defendant is unreasonably not a member of the regulator (in which case the claimant has costs protection) or (b) an attempt at arbitration has failed. To the extent that this is due to the claimant's conduct, there is no reason why the claimant should have costs protection.

15. Lord Justice Leveson's recommendation that the proposals of Lord Justice Jackson referred to above be implemented was expressly predicated on his primary recommendation for an arbitration scheme of that kind not being introduced. He wrote as follows (Part J, Chapter 3, para 3.13):

In the absence of some mechanism for cost free, expeditious access to justice, in my view, the failure to adopt the proposals suggested by Jackson LJ in relation to costs shifting will put access to justice in this type of case in real jeopardy, turning the clock back to the time when, in reality, only the very wealthy could pursue claims such as these. I recognise (as did Jackson LJ) that most personal injury litigation succeeds with the result that qualified one way costs shifting in place of recoverable but expensive ATE insurance is just as likely to cost insurers less and, furthermore, that the same cannot necessarily be said for defamation and privacy cases. An arbitral arm of a new regulator could provide such a mechanism which would benefit the public and equally be cost effective for the press; if such a scheme is not adopted, however, I have no doubt that the requirements of access to justice for all should prevail and that the proposals of Jackson LJ should be accepted: I return to this recommendation at the end of this Chapter. (emphasis added)

16. Lord Justice Leveson repeated this recommendation in para 6.10 of the same chapter:

In the absence of the provision of an alternative mechanism for dispute resolution, available through an independent regulator without cost to the complainant, together with an adjustment to the Civil Procedure Rule to require or permit the court to take account of the availability of cost free arbitration as an alternative to court proceedings when considering orders for costs at the conclusion of proceedings, I recommend that qualified one way costs shifting be introduced for defamation, privacy, breach of confidence and similar media related litigation as proposed by Lord Justice Jackson.

17. It is therefore clear that Lord Justice Leveson only recommended some form of QOCS if no arbitration scheme with costs incentives was introduced. Since such a scheme is likely to be introduced and the necessary costs provisions have been enacted in s. 40 CCA, the MLA's principal position is that there is no justification for any further costs protection.

18. Indeed, not only is there no justification for any form of QOCS, the interaction between s. 40 CCA and QOCS will lead to perverse results which will either undermine the provisions of s. 40 CCA or render QOCS redundant. Thus:

(a) A claimant who fails to use the arbitration scheme, or who uses it but acts unreasonably so that arbitration fails, will nevertheless benefit from QOCS. Section 40(2) CCA will protect the defendant from having to pay the defendant's costs, but QOCS will also protect the claimant from having to pay the defendant's costs. This undermines the balance between the parties' relationship which s. 40 CCA is intended to create. Alternatively, if a claimant's failure to use the arbitration scheme will be regarded as a reason not to grant costs protection, then the costs protection provisions will be redundant.

(b) As already set out above, where the defendant is to blame for the claimant's inability to use the arbitration scheme, s. 40 CCA already provides the claimant with more than adequate costs protection.

A Chilling Effect

19. The introduction of QOCS is intended to be a counterpoint to the abolition of recoverable CFA success fees and ATE premiums, which Lord Justice Jackson recommended across almost all classes of litigation. The abolition of those recoverable additional liabilities was not only justified by the obvious distorting effect which they had and continue to have on litigation and the denial of access to justice to defendants who faced defensible claims but could not afford to risk incurring the costs liabilities which would follow from a failure at trial, but in the particular field of publication claims by the effect on publishers' rights under Article 10 ECHR[4]. The changes brought about by section 44 and 46 of LASPO Act[5], referred to in paragraph 5 of Executive summary, should be brought in without any further delay and extension should not be delayed further[6].

20. The abolition of that recovery will ensure a level playing field between claimants and defendants: defendants can defend cases on their merits rather than in the face of economic

[4] As found by the European Court of Human Rights in *MGN Ltd v UK* [2011] EMLR 20
[5] Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012
[6] in light of the decision in MGN v UK [2011] EMLR 20 and obligation under Article 46 ECHR

duress and claimants will still have access to justice, because CFAs and ATE insurance will still be available to them.

21. That balance is fundamentally undermined by the simultaneous introduction of QOCS. To replace recoverable additional liabilities with a bar on recovery of defendants' costs is simply to replace one incentive not to fight cases with another. The scheme will encourage the bringing of unmeritorious claim in the knowledge that it will be cheaper for a defendant to make an early offer of settlement than to defend itself at trial. This will undoubtedly have a chilling effect on freedom of expression.

22. The comparison has often been made between QOCS and legal aid, but legal aid is only available to those who can show not only that they lack the means to litigate, but that they have a claim which is worth litigating. QOCS exposes publishers to the detrimental aspect of legal aid, namely the inability to recover costs in successful cases, but without the concomitant filtering of the quality of claims to which defendants are exposed.

Controlling Costs

23. Our view is that ensuring that claims can be disposed of at proportionate cost is a better way of ensuring access to justice for all parties than imposing arbitrary limits on a party's costs liability. The 'loser pays' principle, which is at the heart of litigation in this jurisdiction, imposes discipline on litigants, both in terms of whether or not to pursue a claim and the way in which a claim is pursued.

24. The MLA has for several years stressed the importance of controlling costs in defamation proceedings[7]. Annex 2 to this response is the MLA's response to Consultation Paper CP1/2010 ("Controlling Costs in Defamation Proceedings – Reducing Conditional Fee Agreement Success Fees"), which in turn annexes the MLA's response to Consultant Paper CP4/09 ("Controlling Costs in Defamation Proceedings").

[7] suggestions include "proactive early costs management", "proper requirement of proportionality" and "hearings on paper".

TIMING

25. If some form of QOCS is to be introduced, the MLA's view is that it should be dealt with at an earlier stage than the first hearing after proceedings are issued, which will usually be after the close of pleadings, when substantial costs will often already have been incurred. The MLA considers that requests and applications for costs protection orders should be made pre-action and that this should form part of a package of reforms of the Pre-Action Protocol for Defamation to ensure quicker resolution of claims at minimal cost. This issue is raised by question 13 in the consultation paper and is addressed in more detail below, but it has been mentioned here because the question of timing is fundamental to the operation of the scheme.

QUESTION 1: THE SCOPE OF PROTECTION

26. The MLA agrees that the scheme should cover at least the sorts of claims set out in draft rule 44.19. Consideration may need to be given in the future to expanding the class of claims covered if litigants pursue other causes of action in an attempt to circumvent QOCS.

27. We agree that the scheme should in principle benefit defendants as well as claimants, but are doubtful whether defendants will in fact ever be granted costs protection. Even though many news publishers are loss making, while they continue to operate and meet their liabilities such as salaries, it is unlikely that they will meet the "severe financial hardship" test (see further our response to question 5 below).

QUESTION 2: THE PROCESS

28. As set out above, and addressed in more detail below, we believe that the process of requesting and/or applying for a costs protection order should take place before proceedings are issued.

29. We strongly support the idea that costs protection should be subject to review at any stage of the proceedings and that it should not be granted or refused on a "once and for all" basis. This will enable the court to take into account not only changes in the parties' means, but also their conduct of the litigation. We strongly support the idea that the threat of loss of costs protection will serve to moderate litigation behaviour and ensure that disputes are resolved as quickly and cost-effectively as possible.

30. Although the division of claimants into three categories by means is addressed in question 3, as a matter of procedure, we are concerned that the wording of draft rules 44.22 and 44.23 is insufficiently clear and/or will not have the desired effect. Rule 44.22(1)(a) requires the court to consider whether the applicant for full costs protection would suffer severe financial hardship *"if an order containing that provision were not made and that party were ordered to pay another party's costs of the proceedings"*. It is unclear whether, in considering the issue, the court is to take account of the possibility of a capped liability order being made under rule 44.20(1)(b). If the court is only to consider under rule 44.22(1)(a) whether the applicant could afford to pay the entirety of the other party's costs without suffering severe financial hardship, then our view is that all applicants save for the "conspicuously wealthy" (to use Lord Justice Jackson's expression) will qualify for full costs protection, making orders under rule 44.20(1)(b) redundant. On the other hand, if the court is to take account of the possibility of making a capped liability order when considering whether or not to make an order for full protection, then the likelihood is that very many if not most litigants will be able to afford to pay something towards the other party's costs if they lose the claim, so that full protection will only be justified in very few cases.

31. We consider that the latter approach is the correct one and that all litigants except the very poorest should potentially pay something towards the other party's costs, though in no case more than they could afford without suffering severe financial hardship. We believe that there is no public policy justification for removing from litigants who could afford it the burden of paying something towards the costs of the other party where they have litigated unsuccessfully and that the imposition of even a modest potential liability will help maintain discipline in the litigation process. It appears from the wording of paragraph 25 of the consultation paper that the Government agrees.

32. We consider that that approach permits a more straightforward test for the making of a costs protection order, namely that every applicant who would suffer severe financial hardship if required to pay the whole of the other party's costs will have to pay such sum as it is reasonable to require them to pay. It avoids the need for there to be two different forms of costs protection order under rules 44.20(1)(a) and (b). It is akin to the test applied when considering to what extent to permit enforcement of a costs order against a publicly funded litigant, which is well understood by the courts. It requires no more investigation of the applicant's means than the current draft rules would do.

33. Furthermore, while we are content for there to be a presumption that an individual claimant would suffer severe financial hardship if required to pay the entirety of a defendant's costs, we do not accept that there should be a presumption that an individual claimant should obtain full costs protection as opposed to making some contribution.

34. We would therefore propose the following changes to the draft rules:

44.20(1) *A costs protection order will provide that any orders for costs made against the party in whose favour the order has been made may be enforced only to the extent that the aggregate amount in money terms of such orders for costs does not exceed the aggregate amount in money terms of any orders for damages made in favour of that party and such sum as shall be specified in the order ("the contribution").*

...

44.22 *(1) Subject to paragraph (3), the court may make a costs protection order where it is satisfied that*

(a) the party applying for such an order would suffer severe financial hardship if no costs protection order were made and that party were ordered to pay another party's costs of the proceedings; and

(b) it is in the interests of justice to make such an order.

(2) [as currently drafted]

(3) Where the party applying for the order is both (a) the claimant; and (b) an individual, the court will make a costs protection order unless the court is satisfied that that party would not suffer severe financial hardship without the benefit of a costs protection order in the event that that party were ordered to pay the costs of the proceedings of another party.

(4) When making a costs protection order, the court shall assess and record in the order the amount of the contribution (which may be nil), which shall be such sum as the court considers it reasonable for the party in whose favour the order is made to pay, provided that payment of the contribution would not cause the applicant severe financial hardship.

35. Those rules would render the current draft rule 44.23 redundant.

36. If that proposal is not accepted, there is in any event an issue with the wording of rule 44.20(1)(b), which defines the party's capped liability in absolute terms rather than by reference to an excess above the aggregate of damages and interest. We consider this to be wrong in principle, and the reference to interest is otiose as it does not apply to defamation proceedings. If a party does not qualify for full costs protection on the basis that it is reasonable for them to pay something towards any adverse costs, then this sum must apply once there has been a set off of damages, otherwise, unless the sum assessed exceeds the damages, that party will effectively have the benefit of full costs protection even though they have been assessed as not qualifying for it.

37. We also have concerns in relation to the proposals for assessing an applicant's means and their ability to pay costs. First, we are strongly of the view that any statement of means relied upon by a party must, as a matter of course, be served on the other party. For statements of assets only to be viewed by the court, as the draft rules appear to envisage, would represent a clear breach of the rules of natural justice and ECHR Article 6, as the respondent to the application would be deprived of any meaningful basis for opposing it. There is no countervailing public policy justification for withholding statements of means from opposing parties and we note that the consultation paper contains no justification for this highly unusual approach.

38. We note that the Government has explicitly drawn heavily on the costs regime in publicly funded cases in devising the draft rules and that, in publicly funded cases, an applicant for costs to be paid by the legally aided party or the Lord Chancellor must supply a statement of resources which must be served on the other party and/or Lord Chancellor (reg. 16(5) Civil Legal Aid (Costs) Regulations 2013 ("the Costs Regulations")).

39. We see no justification for a different approach here. For the avoidance of doubt, we have no objection to a provision that statements of assets shall be confidential outside the proceedings.

40. Second, we are also concerned at the relatively brief disclosure of assets required by rule 44.26(2), which relates only to the current assets of the party making the statement. Again, we would draw a comparison with the legal aid position as set out in the Costs Regulations. Reg. 14(1)(a) requires a statement of resources provided by a non legally aided party to set out:

(a) the party's income and capital and financial commitments during the previous year;

(b) the party's estimated future financial resources and expectations;

(c) a declaration stating whether the party has deliberately forgone or deprived itself of any resources or expectations, together (if applicable and as far as is practicable) with details of those resources or expectations and the manner in which they have been forgone or the party deprived of them;

(d) any other facts relevant to the determination of the party's resources.

41. It is our view that those considerations are or should also be relevant to assessment of whether a party should qualify for costs protection in defamation claims and that rule 44.26(2) should be expanded to include them.

42. We also consider that specific provisions are needed to address the means of shell companies, which appear to have few or no assets, or companies which appear to be insolvent, but which are in practice supported by wealthy individuals or parent/group companies. We propose inserting two additional sub-rules into rule 44.26 as follows:

(3) Where an applicant for a costs protection order is not an individual and the applicant's statement of assets shows the applicant to have no positive net assets, that party must also file and serve statements of assets from all of the following:

(a) any shareholder of the applicant holding at least 25% of the shares in the applicant;

(b) where over 50% of the shares in the applicant are held by another company ("the parent company"), any other company of which the parent company owns more than 50% of the shares.

(4) Where paragraph (3) applies, in considering whether or not to make a costs protection order in favour of the applicant, the court shall treat as assets of the applicant the combined assets of all parties from whom additional statements of assets are provided in accordance with that rule.

43. Third, we consider that assessment of a party's assets and liabilities must take into account its likely expenditure on legal fees in the course of the litigation and – in the case of a defendant – the likely level of damages to be awarded. Any assessment of means which ignores these will be

entirely artificial and will treat as able to pay costs parties who will in fact not be able to pay costs without suffering severe financial hardship when the time for payment comes. Assessment of the former will be straightforward with mandatory costs budgeting. Assessment of the level of damages could be based on the claimant's asserted value of the claim, which we consider should be provided at the pre-action stage (we address this further below).

44. In any event, there is a lacuna in the rules in that there is no provision for a party to file or serve a statement of assets except on that party's application for a costs protection order. Since the other party may apply for a costs protection order to be set aside or varied, the rules should provide for a respondent to such an application to file and serve an updated statement of assets. Otherwise there will be no process whereby a party which suspects that the financial circumstances of a party which has the benefit of a costs protection order have changed can compel that party to declare its current financial position, supported by a statement of truth.

QUESTION 3: THE THREE CATEGORIES OF LITIGANT

45. As set out above, we agree that some litigants should have full costs protection, some should be required to make some contribution and some should have no costs protection. However, as also set out above, we disagree that those making no contribution and those making some contribution should be regarded as wholly separate categories of litigant; rather in each case it should be a question of what the individual litigant can afford to pay.

QUESTION 4: LEVELS OF MEANS

46. We consider that the expression "severe financial hardship" is well-understood (from the field of legal aid) and an appropriate test of a litigant's ability to pay or contribute to costs. We do not consider that any further delineation of the various categories of litigant is required.

QUESTION 5: "SEVERE FINANCIAL HARDSHIP"

47. We agree that this is the right test. There is a substantial body of case law which illustrates how this expression applies to both individuals and bodies. The case law already addresses the situation of the substantial loss-making organisation. In *R v Greenwich LBC ex p. Lovelace (No. 2)* [1992] 1 QB 155, Neill LJ referred to the need for a large organisation to show *"a quite exceptional burden on its resources"* or *"some real impairment of the ability to function normally"* (at 166). In *Kelly v London Transport Executive* [1982] 1 WLR 1055 the Court of Appeal considered the

position of a body which had a deficit of almost £175 million and held that it did not meet the test of severe financial hardship, since on top of this deficit the sum sought *"would make [no] appreciable difference to the defendants' affairs"* (at 1063, Lord Denning MR). Ackner LJ added that, *"if the consequences of paying a substantial bill of costs results merely in the company having to increase their overdraft and thus reduce to some minor extent their profitability, I would not view such a situation as being one of severe financial hardship or probably even of hardship at all"* (at 1067).

QUESTION 6: THE "MID" GROUP

48. For the reasons set out above, our view is that all litigants should pay a reasonable amount, subject to their ability to pay that amount without suffering severe financial hardship.

QUESTION 7: FACTORS IN DETERMINING A REASONABLE AMOUNT

49. We consider that of principal relevance will be the applicant's means. The starting point should be that they should pay whatever they can pay without suffering severe financial hardship.

50. Other relevant considerations will be:

(a) the conduct of both parties in the litigation to date, including the extent to which both have complied with the letter and spirit of the Pre-Action Protocol;

(b) if costs budgeting has already taken place, the approved budgets of each party.

QUESTION 8: LEVELS OF COSTS IN DEFAMATION CASES

51. We note that Lord Justice Jackson obtained a large amount of evidence of the level of claimants' and defendants' costs in defamation cases, which is set out in Appendix 17 to his Preliminary Report and Tables 34-35 in Appendix 1 to his Final Report.

52. In compiling this response, our members have not had time to gather anything like that quantity of data. However, recent experiences of our members include the following:

(a) Claimants' costs of £994,000 including a 95% success fee in a case which settled after a two day trial of a preliminary issue on privilege, with one witness on each side.

(b) Claimants' costs of £60,000 (including success fee) in a privacy claim which was settled before proceedings were issued for £2,000.

(c) Claimants' costs of £492,265 including success fee and ATE premium in a case which was settled after disclosure, but before preparation of witness statements.

(d) At a costs budgeting hearing, the claimant's budget totalled over £1.2 million for an assumed 10 day trial. The defendant's budget was £372,563 for a 6 day trial. The claimant's budget was reduced by £488,086. The defendant's budget was reduced by £12,100. This demonstrates both the value and urgent necessity of controlling costs. Furthermore the four examples show that (i) it is generally media defendants who require protection from the exorbitant and disproportionate costs incurred by claimants, in cases against the media, rather than the other way round; and (ii) the court needs to take urgent steps to do more to control costs being incurred, as we advocate in paragraph 3 (c) of this response.

QUESTION 9: MEANS OF CLAIMANTS AND DEFENDANTS

53. The MLA is not in a position to provide evidence of claimants' means, since this is not something with claimants have had to disclose hitherto. Clearly claimants range in means from the totally impecunious to the conspicuously wealthy. As for defendants' means, it is well known that many news publishers are consistently loss-making.

QUESTION 10: IMPACT ON BUSINESSES

54. The MLA does not have data on the relative incidence of businesses as opposed to individuals being claimants or defendants in defamation and related claims. Clearly all of the MLA's members are businesses, but members report significant numbers of claims against them by other businesses. Many claims are brought against individuals or small organisations. We suspect that overall businesses are more likely to be defendants than claimants, certainly once section 1 Defamation Act 2013 is in force. To that extent, these proposals will have a substantial negative impact on businesses.

QUESTION 11: PROPOSED ADDITIONAL PROVISIONS

55. We have already set out above our concerns in relation to assessment of means and the withholding of statements of assets from the opposing party.

56. We strongly support the power to remove costs protection from a party if there are grounds to justify it and the specific power to do so if the party with costs protection has rejected a reasonable offer to settle (draft rule 44.24(1)(b)). However, we are concerned that the current wording of that provision allows the litigant's means to trump its conduct of the claim as the costs protection order can only be set aside if the litigant would not suffer severe financial hardship if it had to pay the other party's costs of the proceedings *and* it is in the interests of justice to make such an order. It is important it is clear that offers taken into account into without prejudice save as to costs offers.

57. We consider that wording to be defective in two respects. First, any litigant which would not suffer severe financial hardship if ordered to pay the other side's costs should lose costs protection automatically and without any further consideration. Second, it should be open to the court to deprive a litigant of costs protection if they reject a reasonable offer of settlement, even if their means would otherwise justify a costs protection order.

58. Overall, we consider that the court should have maximum discretion to remove costs protection in appropriate circumstances. We therefore propose the following alternative wording of rule 44.24 (which draws on the approach set out in paragraph 33 above and which would render 44.25 redundant):

(1) *If satisfied at any time that the beneficiary of a costs protection order would not suffer severe financial hardship without the benefit of such an order if that party were ordered to pay the costs of the proceedings of another party, the court must make an order setting aside the costs protection order and such an order shall have retrospective effect.*

(2) *The court may reassess the amount of the contribution under any costs protection order if satisfied that it would be reasonable for the beneficiary of the order to pay a different sum.*

(3) The court may make an order setting aside a costs protection order in circumstances other than those falling within paragraph (1).

(4) In exercising its powers under paragraphs (2) or (3), the court shall take into account all the circumstances of the case, including:

(i) the means of the party benefiting from the costs protection order;

(ii) the conduct of all parties to the litigation;

(iii) any offers of settlement made to or by that party.

(5) An order made pursuant to paragraph (2) or (3) shall not have retrospective effect save as provided in rule 44.27.

59. We have already addressed above the need for the beneficiary of a costs protection order to be required to provide an updated statement of assets whenever the court is to consider setting aside or varying their costs protection.

60. We consider that the court should have the power to deprive a party of costs protection if there has been dishonesty, even if that dishonesty is not "fundamental" (assuming that expression is intended to convey dishonesty as to the cause of action). By way of example, in *Browne v Associated Newspapers* Ltd [2007] EMLR 19, Eady J granted a privacy injunction, *"the judge made it clear that his order for costs, which was that the claimant should pay [another party's] costs on an indemnity basis was much affected by the lie"*[8] though not one which would probably be regarded as "fundamental" under the proposed rules. Our view is that the court should have the power to deprive a party of costs protection in circumstances such as those arising in *Browne* and that rule 44.27(a) should be reworded as *"has told a lie in the course of the proceedings or otherwise engaged in significant dishonesty in relation to the claim"*.

61. We also consider that the court should have the power to deprive a party of costs protection retrospectively if the defendant is able to extinguish the claimant's claim by relying on s. 12 Defamation Act 1952.[9] In such circumstances, the claimant has already been able to make a

[8] Paragraph 78 [2007] EWCA Civ 295

[9] This permits a defendant to reduce the damages payable to the claimant by reference to damages already recovered or sought by the claimant in relation to publication of words to the same effect as those on which the action is founded.

claim for sufficient damages, so the justification for costs protection does not arise. The claim is not attributable to the claimant's need to protect his or her reputation, but solely to his or her desire to obtain more in the way of damages. In those circumstances, there is no policy justification for the defendant's inability to recover its costs from the claimant.

62. Similarly, the court should have the power to deprive a claimant of costs protection retrospectively where the defendant has made an offer of amends in accordance with the Defamation Act 1996, the claimant has not accepted the amount offered, the subsequent litigation has purely concerned the amount of damages to which the claimant is entitled and the amount ultimately awarded has been no more than the defendant's offer. In such circumstances, the defendant would be expected to be awarded its costs and there is no policy justification for preventing the defendant from enforcing that liability to its full extent, since the proceedings were the product of the claimant's desire for more damages rather than vindication and restoration of its reputation, which was provided by the offer of amends. See in this connection paragraph 14 of the Court of Appeal's decision in KC v MGN Limited [2013] EWCA Civ 3.

63. If QOCS is to be introduced alongside an arbitration scheme, then we consider that the court should have the power to deprive a claimant of costs protection retrospectively if the claimant has failed to use the scheme or behaved unreasonably while using the scheme. If this is apparent at the outset of litigation, then this should be a potential justification for not granting costs protection at all on the basis that it is not in the interests of justice to make an order in those circumstances. If it only becomes apparent later in the proceedings, then the court should have the power to revoke the claimant's costs protection whenever it becomes apparent.

64. We also consider that the court should have the power to take an intermediate course by allowing a losing party to set off costs orders in its favour against costs orders in favour of the protected party as well as damages and interest. As presently envisaged, the rules "ring fence" any costs order in favour of the protected party. Thus, if a protected claimant fails to beat a Part 36 offer, the defendant will still have to pay the claimant's costs up to the date of the offer, even if the defendant's costs from the date of the offer exceed the amount of damages and costs.

65. It is our view that, in an appropriate case, for example where the defendant's offer has not been beaten and the claimant has not taken a reasonable approach to negotiation, it should be open

to the court to permit the defendant to set off any balance of the costs due to it after setting off those costs against the claimant's damages against any costs due to the claimant. This can be illustrated as follows: The claimant (who has full costs protection) asserts a claim for £200,000 and makes no offers of settlement. The defendant makes a Part 36 offer of £60,000. At trial, the claimant is awarded damages of £50,000. The defendant is ordered to pay the claimant's costs up to the date of the offer, which total £20,000. The claimant is ordered to pay the defendant's costs from the date of the offer, which total £100,000. Under the proposed scheme, the defendant can enforce the costs order in its favour up to the level of damages, but no further and will still have to pay the claimant's costs, meaning that it has unrecovered costs of £50,000 on top of which it has to pay the claimant's costs of £20,000. We consider that result to be unjust and unjustified by the policy considerations behind costs protection.

66. On the other hand, if the court had the power which we propose, it could permit the defendant to set off the costs due to it against the costs order in the claimant's favour, meaning that it would effectively recover £70,000. This would still leave the defendant £30,000 out of pocket rather than £70,000.

67. We consider that clarification is needed of what is meant by "with retrospective effect". There are two potential consequences of costs protection being set aside without retrospective effect: the first is that costs protection is retained in relation to costs orders which have already been made by the date on which the costs protection is set aside. The second is that the previously protected party retains costs protection in relation to all costs incurred by the other party up to the date on which the order is set aside. This latter approach would be analogous to the termination (but not revocation) of legal aid. We believe that the correct approach in these circumstances is the former and that the wording of the rules should make this clear.

QUESTION 12: THE COSTS OF AN APPLICATION FOR COSTS PROTECTION

68. Provided the respondent to an application is entitled to see the applicant's statement of assets, then we see no reason why the costs of an application for costs protection should not follow the event in the usual way if dealt with at a hearing, though we consider that there should be no order as to costs where such applications are dealt with on paper.

69. If it remains the case that the respondent is not entitled to see the material relied upon by the applicant in making the application, then there cannot be any justification for awarding costs

against a party that unsuccessfully opposes an application, though it ought to be the case that an unsuccessful applicant pays the respondent's costs.

70. We are very concerned at the suggestion of a presumption that a party who unsuccessfully opposes an application for costs protection should be ordered to pay the costs of the application on the indemnity basis. Even if there is full disclosure of the applicant's statement of assets, the possibility of a costs order on the standard basis is a sufficient disincentive to oppose an application unnecessarily and the court will retain the general power to order costs on the indemnity basis in an appropriate case. Furthermore, there is no reason why a disincentive to satellite litigation should only favour the applicant. By the same logic, there should be a presumption that an unsuccessful applicant for a costs protection order should pay the costs on the indemnity basis.

QUESTION 13: AMENDMENT OF THE PRE-ACTION PROTOCOL

71. As mentioned above, we consider that costs protection should be addressed in the pre-action protocol as part of wider reforms to encourage early resolution of disputes.

72. It is our view that a party who proposes to seek costs protection should say so in its letter of claim or letter of response, which should be accompanied by a fully detailed statement of assets and a proposal as to the level of the contribution. The other party should then be obliged to respond, either in its letter of response, or – if the request is made in the letter of response – within 21 days of receipt, indicating whether it accepts that costs protection should apply at all and, if so, whether it accepts the proposed level of contribution. If not, an alternative level should be proposed. If the parties cannot agree the position, it should be possible to seek a determination on paper by the court before proceedings are issued. This will ensure that the parties know from an early stage, before substantial costs are incurred, what their potential costs exposure is.

73. We believe that the pre-action protocol should also require a claimant to state the value of his or her claim in the letter of claim, and that letters of claim have a statement of truth signed by the claimant. Settlement of claims is often hampered by the defendant's inability to know precisely what it is that the claimant wants. This statement of value can then be used to determine whether or not the defendant qualifies for costs protection.

74. Consideration also needs to be given to the application of costs protection where a claimant applies for injunctive relief at the outset of a claim. The costs of such an application can be substantial and it is important that the existence or otherwise of costs protection is established as soon as possible. Our view is that any application by a claimant for costs protection should be made at the same time as the application for an injunction and, if not consented to, the application should be dealt with at the first hearing on notice (the return date if the injunction is initially obtained without notice). Conversely, any defendant seeking costs protection should make an application upon first notice of the application, such application to be dealt with on the return date.

75. It should be made clear in the rules that costs protection does not impact upon a claimant's liability under a cross-undertaking as to damages.

76. We also consider that a procedure akin to the offer of amends procedure under the Defamation Act 1996 should be available in claims for breach of confidence, misuse of private information and claims under the Data Protection Act 1998. As paragraph 10 of the Executive Summary and paragraph 18 of the Consultation Paper make clear it is the Government's wish - which is one the MLA supports - to 'control costs and encourage earlier settlement of cases'. Generally speaking the offer of amends has had that effect in respect of defamation cases which is why there are, we believe, considerable benefits in the Government considering the introduction of a procedure akin to the offer of amends for other causes of action.

QUESTION 14: DRAFTING OF THE RULES

77. We have a number of concerns about the drafting of the rules, which have been addressed in relation to each specific issue.

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