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Legal Costs Briefing

Briefing – Christmas Edition | **December 2017**

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Happy Christmas to all our readers!

Welcome to the December edition of the Goodwin Malatesta Legal Costs Briefing

Christmas is on its way and winter has arrived early with Christmas Card pictures of snowy village greens, children building snowmen and the traditional closed motorways and cancelled flights!

Despite all this festive cheer the world of legal costs still carries on and in this edition we look at the Court of Appeal's recent decisions concerning ATE insurance premiums and assignments of CFAs. We also look at other key issues in the world of legal costs.

As always, we hope you enjoy this legal costs briefing and everyone at Goodwin Malatesta wishes you a happy and prosperous 2018!

Proud to support Kidney Cancer UK

News in Brief

Applying to Increase Costs Budgets

In *Jscmezhdunarodniy Promyshlenniy Bank and Another v Pugachev and Others* [2017] EWHC 1853 (Ch), the court considered an application to increase a budget. The Defendants sought an increase to their budget because the length of the trial had increased from 8.5 days to 10 days. In addition, there were closing arguments.

The Claimant argued that the work had already been budgeted for and there should be no increase. The court disagreed, saying that it was clear that further work would be required than had originally been budgeted for and as the closing arguments would assist the court, he agreed an increase to the original budget.

The use of applications to increase the budget in the event of change appears to still be rare, however, following the decision in *Harrison* (on which we commented in a previous newsletter), the use of these may be set to increase.

CPR Update

A further update to the CPR is designed to clarify that the 1% and 2% cap for fees of preparing and negotiating budgets are based on the whole of the budget (including incurred costs) and not just the budgeted costs, as some had contended.

Goodwin Malatesta raising funds for Kidney Cancer UK and animal welfare charity 'Mutts In Distress' in 2018

We are pleased to announce that we have chosen to support Kidney Cancer UK as one of our designated charities in 2018. Kidney Cancer UK is a British charity established in 2000 to support kidney cancer patients, their carers, medical professionals and scientific researchers. The charity was established by the political scientist Keith Taylor after he was diagnosed with kidney and lung cancer in 1998. We are also supporting a local animal shelter called Mutts In Distress who rescue dogs from local pounds that would otherwise be destroyed, and offer them for rehoming. We look forward to raising as much money as possible to support the important work of these wonderful charities.

The Budgeting Saga Continues – now for hourly rates!

Another issue has arisen as to what amounts to good reason to depart from an approved costs budget with currently conflicting decisions. This time it is whether the alteration of hourly rates on detailed assessment is good reason for depart from an approved costs budget.

One of the conflicting decisions is from Deputy Master Campbell (*RNB v London Borough of Newham* [2017] EWHC B15 (Costs)) and the other from DJ Lumb sitting as Regional Costs Judge (*Baines v Royal Wolverhampton NHS Trust* (unreported and according to Mr. Fletcher)).

Whilst neither decision is binding, they demonstrate that there remains a certain tension in the way courts approach the question of how budgets are to be treated on assessment.

In *RNB*, the Deputy Master considered the rules and the decisions of *Harrison v University Hospitals Coventry and Warwickshire Hospitals NHS Trust* [2017] EWCA Civ 792 and *Merrix v Heart of England Foundation NHS Trust* [2017] EWHC 346 (QB). He concluded that the starting point is that the court does not approve or disapprove hourly rates when budgeting costs, but rather approves an amount that is reasonable. Indeed, that proposition is supported by CPR 3, PD 3E, 7.10 and the White Book, which states *'it is expressly not the role of the Costs Management to fix or set hourly rates'*.

Despite this, there have been instances where the court has looked into the hourly rates at the budgeting stage (see for example *Stocker v Stocker* [2015] EWHC 1634 (QB) and *GSK Project management Ltd v QPR* [2015] EWHC 2274 (TCC)).

The Deputy Master therefore found that if the court approves the hourly rates at the budgeting stage, then it would not be open to either party to challenge

them at a later stage. However, if the rates are not approved previously, then they are open to be considered at the assessment stage.

If the judge on the assessment considers that the rates in the pre-issue costs are too high and those rates continue throughout the other stages of the budget, then that would be good reason to depart from the budget and reduce the costs of the budgeted stages downwards accordingly. In coming to this conclusion, the Deputy Master referred to the decision in *Merrix* and the notes on the decision in the White Book which state '*the fact that hourly rates at the detailed assessment stage may be different to those of the budget may be a good reason for allowing less or more, then* (sic) *the phase totals in the budget'*.

The Deputy Master also considered that he could reach the same decision through the route of the new proportionality test.

In *Baines*, no copy of the judgment has been circulated and the reports of the decision do not provide the rationale, so the decision must be viewed with more than a little pinch of caution. It has been reported that the Regional Costs Judge determined that reducing the costs for budgeted costs to the same level as those allowed for the pre-issue costs would be to second-guess the thought process of the judge who undertook the budgeting process and risk importing a double-jeopardy into the detailed assessment.

It is hard to see on what basis this latter decision could be correct, given the very reasoned comments set out by the Deputy Master in *RNB*.

If the principle in *Baines* was the one opted for by the Court of Appeal, then any party who wished to challenge the hourly rates would have to persuade the court that they should reduce the rates at the budgeting stage. The difficulty is that, despite the cases noted in *RNB*, doing this is contrary to the rules and some judges may be reluctant to go down that road.

If the hourly rates were not dealt with at the budgeting stage, it would then mean that even if a party successfully argued on assessment that the hourly rates were too high the budgeted sections, including the excessive rates would still be allowed as claimed, opening the door for parties to charge any hourly rate they wanted to, safe in the knowledge it would never be challenged.

In addition, such arguments would lengthen the budgeting hearings themselves and tie up the court timetable, leading to lengthy delays in all cases.

If the principle in *RNB* is the one adopted, however, the judge at the budgeting hearing can follow the PD in leaving the hourly rates alone and these would then be open to be challenged by either party on the assessment.

The core problem underlying all of these cases is that there is no way to wholly reconcile budgeting with assessments. However, although the court previously suggested that the bar for good reason should be set high, it should not be the case that parties are left in the position of having to ask the court to disregard the PD at the budgeting stage, and it can only be hoped that when the Court of Appeal consider *RNB* they will not only provide some clarity, but also that common sense will prevail.

CFAs – To assign or not to assign? That is the question

The judgment in *Budana v Leeds Teaching Hospitals NHS Trust* [2017] EWCA Civ 1980) has been released and we finally have some clarity on assignment and novation of CFAs. We consider the judgment and whether it really is the end of the road.

Background

The claimant had entered a CFA with Baker Rees (BR) after having a tripping accident whilst attending the defendant's hospital. BR subsequently decided that PI litigation was not economically viable in light of the Jackson reforms and arranged to transfer their PI caseload to Neil Hudgell Limited (NH).

The transfer was undertaken by way of a Transfer Agreement and a Deed of Assignment. Letters were also sent out to the claimant advising of the change. The claimant did not object to this transfer and indeed signed and returned a letter of instruction from NH following the transfer.

At the assessment, the defendant raised the issue with the validity of the transfer of the CFA from BR to NH. HHJ Robinson found for the defendant, holding that the CFA was terminated when it was transferred to NH. The claimant appealed and due to the important nature of the issues, the appeal was leap-frogged to the Court of Appeal and the Law Society intervened.

The Parties' Positions

The argument of the defendant was that a CFA was a personal contract and could not be assigned. Therefore, the contract had been terminated by the letters on transfer to NH and the new agreement was a novation. A novation means that the rights were not transferred and so the agreement with NH would be a new CFA. As that CFA had been entered after April 2013 and therefore post-LASPO, the claimant would not be entitled to recover any success fee on their costs in accordance with s44 LASPO.

The claimant argued, however, that the contract had been assigned, meaning that the benefits and burdens of the contract had been transferred from BR to NH and therefore the CFA simply continued without break and they could recover the success fee.

The questions that the court considered were therefore whether there had been a termination of the CFA, whether there had been an assignment or a novation and the position of s44 of LASPO.

Termination?

Gloster, LJ noted that neither any letter nor any transfer of the CFA could amount to a termination of the contract without the claimant choosing to treat the contract as terminated. If there is a repudiatory breach of the contract, that does not terminate the contract, rather the contract subsists until or unless the other party decides whether to terminate or affirm the contract.

In this matter, because the claimant signed the letter of instruction with NH and continued instructing them, the court held that she had affirmed and not terminated the contract.

Assignment or novation and s44 LASPO

Gloster, LJ believed that the question in relation to these issues should be phrased as:

'whether, for the purposes of the transitional provisions of section 44(6) of LASPO, the fee payable by the claimant to NH, under the "transfer" arrangements between BR, NH, and the claimant, was "a success fee payable by… [the claimant] under a conditional fee agreement entered into before" 1 April 2013'

Gloster, LJ held that a CFA was a personal contract and that the language used in the contract documents envisaged the discharge of BR's obligations and therefore what had occurred was a novation, rather than an assignment. The answer to the issue was, as Gloster LJ saw it was 'much more finely nuanced, but ultimately simpler, than either party contended'.

Firstly, she felt that in the modern business environment there was no reason why the benefit and burden of an agreement, or even the solicitor's entire 'book' could not be transferred to a new firm because, in her view, what a client wants is *'representation by a competent practitioner and not necessarily representation by a specific individual'*.

However, the element of consent was found to be crucial to this as the client must consent to the transfer.

Gloster, LJ criticised the decision in *Jenkins* (which has long been relied on) as being wrongly decided (paras 57-63) but that in any event, it did not give any assistance in this particular case. In this matter, she considered that the claimant entered into a new contract as of 10 April 2013; there had been an assignment, rather than a novation.

Although the CFA with NH was therefore a new contract made post-LASPO, Gloster, LJ did not consider that this also meant that the success fee was not recoverable. In fact, the terms of the transfer documentation made it clear that

NH would simply be substituted into BR's place as the solicitor acting for the claimant on the same conditions as the existing retainer (the CFA). Those documents intended that NH would be able to enforce the success fee that had accrued both on BR's costs and their own.

Thus, she considered that *'[i]t is clear that the modern approach to statutory interpretation takes account of the apparent policy of that legislation'* as set out in Plevin v Paragon Personal Finance Limited ([2017] UKSC 23):

'The purpose of the transitional provisions of LASPO, in relation to both success fees and ATE premiums, is to preserve vested rights and expectations arising from the previous law. That purpose would be defeated by a rigid distinction between different stages of the same litigation'

Gloster, LJ further considered that an over technical application of the doctrine of novation would defeat that intended purpose. She did add, however, that it would depend on the *'precise terms of the relevant contractual arrangements'* that the parties entered and whether the 'new firm was indeed intended to operate "under" the terms of the previous CFA'.

Beatson, LJ agreed entirely with this interpretation, however, although Davis, LJ also agreed with the overall conclusion, he reached it by a different route, considering that there had, in fact, been an assignment as opposed to a novation.

Conclusion

The court appears to have ensured that whether there is an assignment or a novation, any success fee may be recoverable.

However, there is an important caveat to that which may still leave avenues for arguments to defendants; namely that the recovery of the success fee is very much dependent on the particular wording of the contractual documentation that gives effect to the change of solicitor. Whilst some of these are, like the documentation between BR and NH worded effectively, there are others which are not and where this is the case, challenges can still be made.

Thus, even though the case stitches up the question of whether there is an assignment or a novation, the door has been left open for other challenges depending on the circumstances of the case.

ATE Insurance Premiums in the press again!

We reported recently on the case of *BNM v MGN Limited & Others* and whether the old or new proportionality test applied to additional liabilities taken out prior to April 2013. ATE premiums in clinical negligence claims has been the next issue to go to appeal.

In *Peterborough and Stamford Hospitals NHS Trust v Maria McMenemy* [2017] EWCA Civ 1941 the court considered whether ATE premiums in clinical negligence cases could reasonably be taken out prior to evidence being obtained and whether *Callery v Gray* [2002] UKHL 28 remained good law.

When it is reasonable to take out an ATE premium?

The first question considered by the court was whether it was reasonable in post-Jackson clinical negligence cases to take out ATE insurance before evidence had been obtained.

The court considered *Callery v Gray*, in which the court had also considered with other issues, the reasonable time when a premium could be taken out. In *Callery* the court held that:

'we have concluded that where, at the outset… ATE insurance at a reasonable premium is taken out, the costs of each are recoverable from the defendant in the event that the claim succeeds, or is settled on terms that the defendant pay the claimant's costs'

In considering whether this case still applied to post-Jackson cases, Lord Lewison when handing down a unanimous decision, considered the

explanatory memorandum to The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No. 2) Regulations 2013 and concluded that:

'*there can be no doubt that the understanding was that ATE insurance was taken out "after an actionable event"; and that often it was taken out at the same time as the CFA: i.e. when solicitors were first consulted*'.

This means that the principle laid down in *Callery* remains that ATE insurance can be taken out at the outset. In simple claims where the matter is settled without the need for a medical report, or settled prior to the issue of proceedings, an ATE insurance premium will therefore still be payable in principle.

Can it still be argued it was unreasonable to take out ATE Insurance?

The court then considered whether the pre-Jackson case of *Rogers v Merthyr Tydfil* was also still good law and held that the principle that '*costs judges do not have the expertise to second guess the insurance market*' remained good law in the post-Jackson world. The court did add that:

'*it may well be that it would be open to a defendant to argue that it was unreasonable or disproportionate to take out one kind of ATE insurance rather than another*. *The old practice direction directed consideration to the question whether any part of the premium would be rebated on early settlement, and it may be that it would be unreasonable in some cases to take out a single premium policy rather than one with stage payments; or one with the possibility of rebated premiums.'*

This effectively brings us full circle back to where we were pre-Jackson and the same problems may still arise for paying parties when challenging the reasonableness of ATE insurance premiums (for example, whether sufficient contemporary evidence can be obtained). However, there is still a glimmer of hope for Defendants……

Challenges as to quantum

Counsel for Ms. McMenemy and Mr. Reynolds argued that once a claimant has a costs order, the premium is automatically recoverable without any further control by the court and that the market alone would ensure the reasonableness of the premium. This could mean that the claimant could enter an ATE policy for any amount at the outset and it would never be considered

or scrutinised by the court. Thus, it would always be allowed as claimed, no matter how unreasonable the amount sought.

Fortunately, the court was *'sceptical about the submission that ATE premiums can be controlled solely by market forces'* and further considered that it was '*unlikely that Parliament chose to allow the level of recoverable ATE premiums to be determined solely by such an imperfect market*'.

It was therefore determined that the court has a discretion to assess the reasonableness of the premium and ultimately what is allowed on assessment is '*what the costs judge will allow'*.

It was also observed that it was common ground in *BNM* that the new proportionality test would apply to ATE premiums in clinical negligence cases post April-2013 and this was not doubted by the court. Thus, Lord Lewison considered '*once a costs order is made, its assessment must be governed by the CPR, as the court implicitly acknowledged in* [BNM]'.

However, it was also noted that the quantum of such ATE Insurance premiums was not an issue the court was being asked to address and issues as to quantum are being considered in yet another test case, the outcome of which is still awaited.

Therefore, even if the Defendant cannot obtain the evidence to show that a policy should not have been taken out at all, it appears possible for reductions to the ATE insurance premium claimed to be achieved through the new proportionality test.

The Future

Lord Lewison made an obiter comment how it was unfortunate that the Rules Committee had not provided rules or practice directions to deal with the recoverability of ATE insurance premiums in those cases where premiums are still recoverable and he invited them to reconsider that position, pointing out that '*at the moment, however the pieces of the jigsaw puzzle are manoeuvred they do not all fit properly'.*

Whether any new rules will flow from this is yet to be seen, but it would not be the first time that the Rules Committee saw fit to change the rules as a result of case law.

It will also remain to be seen how the court decides quantum of ATE insurance premiums should be dealt with in the outstanding test cases, but it can only be hoped that the court ensures, unlike in the pre-Jackson world, that premiums are not allowed to get out of control.

The New Format Bill of Costs

The new electronic bill will become compulsory from April 2018 in certain cases. The minutes published from the CPRC Committee confirm that the ultimate intention is that the compulsory pilot will be extended to all courts, but for the time being will be limited to the SCCO.

The limited roll-out is due in part to issues identified, namely that although the SCCO is confident that they have the IT capability to deal with the new bills, many County Courts do not and although further provision has been promised, it is not clear when this will happen.

The pilot that was running on an optional basis had very little take-up by practitioners, so that only three bills have been filed and none have been assessed. The CPRC have stated that '*on that scale no problems of any significance have emerged. The new bill certainly works.*' It is certainly interesting that they have come to this conclusion in the absence of a single assessment. It was decided to make the pilot compulsory in order to increase the take-up so that a better analysis can be made of the new bill.

There have currently been three attempts to try and create an electronic bill of costs. The first attempt by the ACL/Hutton Committee relied heavily on J-Codes. These were subsequently abandoned (perhaps it became apparent that as they were being used for a purpose that they had not been intended for, they were always going to be problematic, but perhaps even more

compelling was the fact that America abandoned their usage as they did not even work for the purpose they were created for) and so the ACL attempted another version, which included space for the Points and Replies to be included within the bill spreadsheet (as if it was not complex enough already). The third attempt comes from a sub-committee set up by the CPRC and this version is attached to their published minutes and will likely be the precedent attached to the rules.

None of those are compulsory, however, as even the bill prepared by the sub-committee has been recognised to have limitations and in certain circumstances (particularly any indemnity principle calculations where costs are claimed under an issue-based costs order). Thus, parties are free to prepare their own templates as long as they comply with the requirements set out in the PD.

Changes to CPR 47 have been published with the minutes, although are too numerous (and lengthy) to reproduce in full here. Some of the key elements are that:

The electronic bill will only apply to costs after April 2018, so a paper bill in the old format can still be filed for work undertaken up to that date in addition to an electronic bill for work undertaken after that date.

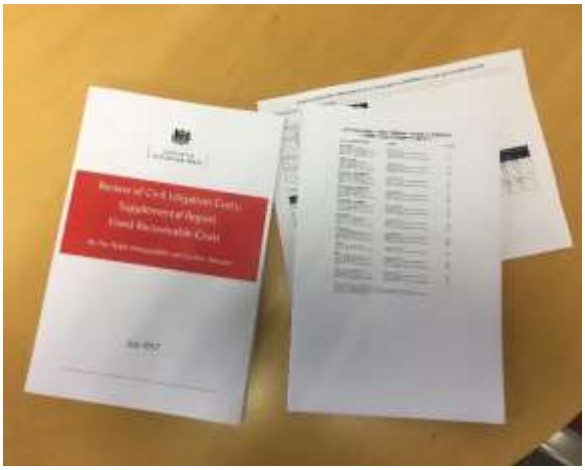
The electronic bill will only apply (for the time being) to cases being heard in the SCCO and will not apply to cases where the proceedings are subject to fixed or scale costs or where the court orders otherwise.

A precedent Q is not required if the spreadsheet already contains a breakdown in the same format.

An email address must be provided when sending the bill to the court so that the court can return the bill electronically after the assessment.

Capped/Fixed Costs Pilot Scheme

Proposals have been put forward for a capped costs and fixed costs pilot scheme for claims up to a value of £250,000. Details of the scheme are contained in the recently published CPRC minutes.



The scheme is also intending to consider which of costs capping, costs budgeting or fixed costs is the best method for controlling costs overall.

Entry to the pilot will be voluntary and both sides will need to agree to participation. It is intended to be similar to the Shorter Trial scheme supported by a costs capping regime. Caps are set for the various stages and there will be a maximum cap.

Clause 2.28 states that '*the general rule is that no disclosure will be ordered and the parties will be able to rely only on the documents contained in the bundles of core documents'*. Disclosure was something highlighted by Jackson, LJ in his final report as a driver of high costs and so this is hardly surprising.

At the meeting, questions were raised of Jackson, LJ who attended as to how this non-disclosure would operate in clinical negligence. Jackson LJ responded by advising that the intention was to promote certainty and access to justice, however, the application of this scheme to clinical negligence would promote neither of those and it was not therefore intended that it should apply to such claims. It can only be hoped that the intended working party will deal with such issues as part of the setting up of an independent scheme for these claims. It was noted that such non-disclosure would be less of an issue in other types of claims.

The capped costs pilot is intended to run in the London Mercantile Court, the Mercantile Court at Leeds and Manchester, the TCC at Leeds and Manchester and the Chancery Division in the District Registries at Leeds and Manchester. A set of PD for the pilot and the way it will operate have been published.

In terms of costs, budgeting will not apply to any case in the costs capping scheme. There will be a summary assessment of the costs of the party in whose favour any order for costs is made and CPR r 44.2(8), 44.7(1)(b) and Part 47 will not apply.

The caps are set out in a table as follows:

Work done in respect of:	**Maximum amount of costs:**
Pre-action	£10,000
Particulars of Claim	£7,000
Defence and Counterclaim	£7,000
Reply and Defence to Counterclaim	£6,000
Case management conference	£6,000
Disclosure	£6,000
Witness Statements	£8,000
Experts' reports	£10,000
Trial and judgment	£20,000
Settlement negotiations/mediation	£10,000
Making or responding to an application	£3,000

Work done post-issue which is not otherwise covered above	£5,000

Whilst these together add up to £98,000, the maximum that any party would be able to recover will be £80,000. Court fees, enforcement costs and wasted costs may be recovered in addition to this overall cap, however and VAT will also be added on to the overall sum allowed, if applicable.

If a party acts unreasonably in relation to an application, then the court may summarily assess at the hearing. In those circumstances, any amount awarded will be in addition to the overall cap.

Although Part 36 will apply to costs in the capped scheme, this is with certain qualifications. Where an offer is made but not accepted, costs will be allowed up to the date of the offer then unless it is unjust to do so, the claimant will receive the capped costs up to the date of the expiry of the relevant period and the defendant will get their costs on a capped basis from the expiry to the date of judgment.

If an order is made in accordance with CPR r 36.17(4) (judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer), the claimant will get:

- interest at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

- costs on the capped basis up to the expiry of the relevant period; costs on the indemnity basis following the expiry of the relevant period save that the maximum allowed under each cap shall be increased by 20% and the total shall not exceed £100,000;

- an additional 10% of their damages or, if there is no monetary award, 10% of the amount awarded in costs.

Fixed Costs and Part 36 offers

Although, as we have observed above, future fixed and capped costs regimes will deal with what happens when a Part 36 offer is beaten, the current rules provide no such clarity.

This lack of clarity has led to a number of inconsistent and conflicting decisions (see for examples: *Solomon v Cromwell* [2012] 1 WLR 1048, *Ontulmus v Collett* [2014] EWHC 4117, *Broadhurst v Tan* [2016] EWCA Civ 94, *Sutherland v Khan* (2016) (unreported), *Ali v Sabre Insurance Company Ltd* (2016) (unreported), and *Hislop v Perde* (2017) (unreported)).

Adding to the confusion, DJ Besford, who previously determined in *Sutherland v Khan* (one of the most relied on of these cases) that fixed costs should apply up to the date of the expiry of a Part 36 offer and indemnity costs should apply thereafter has now said in *Whalley v Advantage Insurance* (2017) (unreported) that Sutherland was *'not supported from a detailed analysis of the rules and case law*' and could no longer stand. It is quite extraordinary for a judge to admit that his previous decision was wrong, but as neither decision is binding, it is difficult to see how other courts will interpret this volta-face.

It could be however, that as Jackson, LJ criticised *Sutherland* in his recent supplemental report that the appetite amongst judges to follow this decision may decline. However, since the current rules are silent as to what the position should be, it ought to be a matter for higher courts to determine what the position should be, even if this is not the same as future fixed costs regimes.

Notwithstanding this, at the current time there is no High Court or Court of Appeal authority on the issue, leaving it very much in the air and to the discretion of the relevant judge on the relevant day.

In a similar vein, the case of *Lewin v Portsmouth*, which dealt with whether the fixed fee in assessment could be exceeded where a Part 36 offer is beaten has, according to Professor Regan been appealed to the Court of Appeal.

Whether this will provide any wider guidance on fixed costs regimes and fixed costs will have to be seen, but it can only be hoped that clarity will follow.

Meet The Team - Laura Dear

Laura is a Costs Lawyer and joined our team in April 2016 and has since been involved in many complex claims for costs in civil and criminal proceedings.

We asked Laura to tell us a bit about herself and how she spends her Christmas.

What do you enjoy about your work?
Achieving good recoveries / savings when negotiating costs

Career high?
Qualifying as a Costs Lawyer and joining GM of course!

Favourite Christmas song?
“Step into Christmas” by Elton John or “Merry Christmas Everyone” by Shakin’ Stevens – I can’t choose!

Favourite Christmas Film?
National Lampoons Christmas Vacation

TV Programme?

Game of Thrones – say no more!

What is your ideal way to spend Christmas day?
Plenty of food (Christmas cheese!) plenty of wine, my family around me and the usual classics on the tele…… probably an argument over Pictionary at some point as well!