

**IN THE COURT OF APPEAL**

**Appeal No. CA-2026-000805**

**ON THE APPEAL FROM**

**THE HIGH COURT OF JUSTICE**

**Claim No. HP-2022-000024**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**INTELLECTUAL PROPERTY LIST (ChD)**

**PATENTS COURT**

**B E T W E E N : –**

DR DAVID PARSONS

Appellant/Claimant

-and-

CONVATEC LIMITED

Respondent/Defendant

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**APPELLANT'S SKELETON ARGUMENT**  
*for the Section 106 appeal*

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## A. INTRODUCTION

1. The Appellant is Dr Parsons, who seeks an order for an award under **s.40 of the Patent Act 1977 ('the Act')**. The central point in this appeal is a short point of statutory construction, namely the proper construction of **s.106** of the Act. It has an important bearing (to say the least) on these proceedings and upon the outcome for the Claimant and has important implications for access to justice in employee inventor compensation cases under **s.40** of the Act.
2. At a Costs Management Conference on 30 January 2026, Dr Parsons contended that s.106 of the Act applied to decisions made by the Court when costs budgeting and this required the Court to have regard to all the circumstances, including the financial position of the parties, when making a costs management order under CPR r.3.15(2).
3. The Judge, Richards J, found it did not, but if that were wrong, it would make no difference: in his judgment dated 16 February 2026, he held that s.106 did *not apply* to the approval of a costs budget (Judgment at [18] and [25] [Core/18/118 and 120]), and even if it did, he would *not* have made any adjustment to Convatec's costs budget (at [34] to [40] [Core/18/121-122]).
4. If, as Dr Parsons contends, the learned Judge fell into error in construing **s.106** as he did, that error vitiated the Judge's secondary conclusion that s.106 would make no difference and, in any event, he failed to take into account the effect on the Appellant's ability to pursue the claim of failing to restrict the Respondent's budgeted costs (having in mind the purpose of the provision) and overlooked the importance of certainty as one of the principal purposes and advantages of costs budgeting.

### A.1 Section 106

5. The primary purpose of **s.106** of the Act primarily sought to address the asymmetry of financial resources between an employee inventor and their employer, by requiring that, *'in determining whether to award costs or expenses to any party and what costs or expenses to award'*, the Court *'shall have regard to all the relevant circumstances, including the financial position of the parties'*.

6. The implicit premise of s.106 is that it is inherent in s.40 claims that there may be a stark inequality of arms, between employee and employer – as the Judge found here at [33] [Core/18/121].
7. As originally enacted, s.106 was confined to s.40 claims, as follows (emphasis added):

**106. Costs and expenses in proceedings before the Court**

- (1) *In proceedings before the court under section 40 above (whether on an application or on appeal to the court), the court, in determining whether to award costs or expenses to any party and what costs or expenses to award, shall have regard to all the relevant circumstances, including the financial position of the parties.*
  - (2) *If in any such proceedings the Patents Court directs that any costs of one party shall be paid by another party, the court may settle the amount of the costs by fixing a lump sum or may direct that the costs shall be taxed on a scale specified by the court, being a scale of costs prescribed by the Rules of the Supreme Court or by the County Court Rules.*
8. It was agreed before the Judge (see [9]) that ‘the conjunction “and” simply means that the court must consider financial circumstances both when considering whether to award costs and when considering what costs to award’ [Core/18/115]. The issue in this appeal is whether s.106 is operative in relation to the latter, ‘considering what costs to award’.
  9. Parliament has now amended the scope of the provision so as now to apply to claims such as infringement, actionable threat and declaration or declarator proceedings:–

**106. Costs and expenses in proceedings before the Court**

- (1) *In proceedings to which this section applies, the court, in determining whether to award costs or expenses to any party and what costs or expenses to award, shall have regard to all the relevant circumstances, including the financial position of the parties.*
- (1A) *This section applies to proceedings before the court (including proceedings on an appeal to the court) which are —*
  - (a) *proceedings under section 40; [...]*
- (2) *If in any such proceedings the Patents Court directs that any costs of one party shall be paid by another party, the court may settle the amount of the costs by fixing a lump sum or may direct that the costs shall be taxed on a scale specified by the court, being a scale of costs prescribed by rules of court.*

## A.2 The Judgment under appeal

10. Richards J held that s.106 did **not** apply to costs management decisions, at [18] and [25] [Core/18/118-119 and 120]. The first sentence of paragraph [17], and paragraph [18], vividly illustrate the primary issue in this appeal and, with respect, the Judge's error (emphasis added):
  17. *I am prepared to accept, without deciding, that there might be occasions where a court is "determining ... what costs or expenses to award" even if its decision does not either fix an amount of costs payable or a basis on which costs are to be determined. [...]*
  18. *However, I have concluded that the costs budgeting hearing I have conducted is not such an occasion. Following that hearing, if (i) the court decides, in the future, to award Convatec its costs at all, and (ii) it makes any such award on the standard basis then (iii) the court has determined the amount of future costs (not incurred costs) that Convatec will be awarded unless (iv) there is good reason to depart from that figure. I do not accept that this involves the court determining "what costs or expenses to award".*
11. That is considered further below. However, it may be helpful to trace at least the key steps in the arc of the Judge's reasoning, from premise to conclusion, as follows:–
  - (1) **The issue:** At [11], the Judge stated that the application of s.106 was a question of statutory construction requiring him to '*decide what the statute means when it speaks of "determining ... what costs or expenses to award" and whether the process of costs budgeting answers to the statutory description*' [Core/18/116].
  - (2) **Purpose:** As to the purpose of s.106, the Judge said this, at [12] (emphasis added):
 

*'... both sides accept that s106(1) was expressed to apply to disputes under s40 of the Act because such disputes will often involve an inequality of arms as an employer might be expected to have greater financial resources than an employee. It seems to me clear, simply from the statutory words used and without any recourse to Hansard, that Parliament wished the court to have tools that would reduce the risk that a concern about an ultimate costs award would operate as a disincentive to employees bringing claims under s40.'* [Core/18/116]
  - (3) **Cost Budgeting:** The Judge described the task of costs budgeting at [13], but did not consider the purpose and heralded advantages of costs budgeting, identified

in Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ 792 [2017] 1 WLR 4456, by Davis LJ, speaking of not departing from costs budgets, at [61]: *'the very decided advantage of achieving clarity, certainty and finality'* – addressed further below (at §25 to 28) [Core/18/116-117].

- (4) **Submissions:** At [14] and [15], the Judge gave his summary of submissions [Core/18/117-118].
- (5) **Drafting:** At [16], the Judge dismissed the significance of the *'relatively slender difference between the wording of s106 and the wording of s63(2) of the Act'*, which speaks of *'when awarding damages, costs or expenses'* [Core/18/118].
- (6) **Determination:** At [17], as noted above, the Judge was *'prepared to accept, without deciding, that there might be occasions where a court is "determining ... what costs or expenses to award" even if its decision does not either fix an amount of costs payable or a basis on which costs are to be determined'*. (emphasis added) [Core/18/118]
- (7) **Example:** However, in the same paragraph, his example of such a case to which s.106 would apply was *'if the court is fixing a case management hearing at which the question of whether to award costs, or what costs to award, is to be debated, it may need to decide where that hearing should take place, or whether it should take place in person or remotely'*. This is said to be because *'when making a decision such as this, the court is making a decision on what costs or expenses to award since its determination is part of an overall process that will necessarily lead to such a decision'*. It is not immediately obvious why such a decision would be part of the *'overall process'*, but actually determining the sum to be paid, if a costs order is made<sup>1</sup> would not be.
- (8) **Conclusion:** At [18], set out in full above, the Judge concluded that, even though, on the contingencies identified in (i), (ii) and (iv), *'the court has determined the amount of future costs (not incurred costs) that Convatec will be awarded'*, he did *'not*

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<sup>1</sup> Unless departed from for good reason, or indemnity costs are ordered: see Harrison.

*accept that this involves the court determining “what costs or expenses to award”.*

[Core/18/118-119]

- (9) **No bearing:** At [19], the Judge held that *‘Dr Parsons’ financial position can have no bearing on the matters that the court must determine as described in paragraph 13.’* [Core/18/119]
- (10) **Reassurance:** At [21] and [22], the Judge leant heavily upon the concept of *‘reassurance’*, which made little sense in the context of s.106 potentially applying at the end of the proceedings, but (for these purposes) not before [Core/18/119]. At [21], he effectively confined the purpose of s.106 solely to offering *‘some reassurance to both sides that their financial position would be taken into account when the court is deciding whether to award costs and, if so, what costs to award’* after trial and thereby limited the application and effect of s.106, on the basis that *‘when the trial concludes, he [Dr Parsons] will be free to argue that his financial position should have some effect on any costs order that the court makes’*. As Arnold LJ noted, when granting permission, this did not really engage with the consequences of that approach upon Dr Parsons’s ability to pursue the case at all.
- (11) **Practical impact:** Here, a retired scientist faces a multi-billion dollar company, is in no position to fund the litigation (and take the costs risk) himself and must obtain funding and After-the-Event insurance. The Judge’s appraisal did not reflect reality, in failing to take that into account, despite his observations at [23] and [24] and the fact that Dr Parsons is seeking to bring a claim under s.40 (in relation to inventions, some of which even Convatec admits he made) is not to be regarded as somehow a choice for which he should be deprived of the very protection which Parliament enacted in order to seek to *facilitate* the bringing of such claims [Core/18/119-120].

### A.3 Permission

12. Arnold LJ granted permission to appeal by an Order dated 15 June 2026 [Core/13/82], giving the following Reasons and Information for the parties:

#### Reasons

*Although the judge's decision was a case management decision, and it is normally inappropriate for this Court to interfere with such decisions, ground 1 raises an issue of statutory construction concerning section 106 of the Patents Act 1977 which has a real prospect of success. That is not sufficient unless ground 2 also has a real prospect of success, and ground 2 challenges the judge's exercise of his discretion. With some hesitation I have concluded that it is arguable with a real prospect of success that the judge's exercise of discretion was flawed, in particular because he failed to take into account the effect on the Appellant's ability to pursue the claim of failing to restrict the Respondent's budgeted costs.*

#### **A.4 Prior authority**

13. In short, the process of deciding whether costs are reasonable and proportionate in order to set a budget which will bind the parties unless there is good reason<sup>2</sup> otherwise is clearly part of the process of determining '*what costs to award*' (and on the critical path to doing so) within the meaning of s.106. Research has revealed no direct authority on the application of s.106 to costs management.
14. There is only one mention of s.106, in an unreported reasoned order by the single judge, Floyd LJ, at the PTA stage, in an appeal to the Court of Appeal in Shanks v Unilever Plc. Floyd LJ resolved the application made under what was then CPR 52.9A(3) without oral argument, on the papers, and made an order restricting costs of the appeal to £50,000.
15. However, in relation to s.106 (invoked by Prof Shanks to bolster the argument under CPR 52.9A(3), which applied to cases where costs below were limited or excluded at first instance), Floyd LJ said this:
 

*'I am not persuaded that section 106 of the Patents Act 1977 has any application at this stage as opposed to when costs are awarded. I leave open whether it applies at all in the Court of Appeal.'*
16. Even if that was *obiter*, it remains the only reference to the application of s.106, albeit (i) in the Court of Appeal and (ii) in the context of an express provision for costs-

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<sup>2</sup> CPR 3.18(b) precludes departure from the costs budget unless there is good reason to do so.

capping which then applied in the Court of Appeal. Parenthetically, CPR 52.9A(4) expressly provided that '*any application for such an order must be made as soon as practicable*' and, in JJ Food Service Ltd v Zeki Mehmet Zulhayir [2013] EWCA Civ 1304 (31 October 2013), the applicant's failure to do so was effectively dispositive. By contrast, here, the learned Judge has put off any real impact of s.106 (other than, perhaps, for interlocutory orders) to the end of the trial in 2028.

17. If and to the extent that Shanks might otherwise be binding, Dr Parsons would respectfully invite this Court to depart from the observations of Floyd LJ, made as a single judge without the benefit of oral argument, in support of a different application.

## B. COSTS AND COSTS BUDGETING

18. As per CPR r.44.2(1), the court has discretion as to (a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid.
19. CPR r.44.2(2) provides that, if the court decides to make an order about costs (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order.
20. CPR r.44.4 (to which paragraph 5 of PD3D refers) is titled '*Factors to be taken into account in deciding the amount of costs*'. CPR r.44.4(1)(a) states that if the court is assessing costs on the standard basis, it will have regard to all the circumstances in deciding whether costs were (i) proportionately and reasonably incurred; or (ii) proportionate and reasonable in amount.
21. The rules on costs management are set out in Section II of Part 3 of the CPR. Where this section applies, pursuant to CPR r.3.15, the court may make a costs management order:

### **CPR 3.15**

*(1) In addition to exercising its other powers, the court may manage the costs to be incurred (the budgeted costs) by any party in any proceedings.*

*(2) The court may at any time make a 'costs management order'.... By a costs management order the court will—*

*(a) record the extent to which the budgeted costs are agreed between the parties;*

*(b) in respect of the budgeted costs which are not agreed, record the court's approval after making appropriate revisions;*

*(c) record the extent (if any) to which incurred costs are agreed.*

*(3) If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs.*

22. CPR r.3.15A provides for the revision and variation of costs budgets on account of significant developments.

23. In deciding the reasonable and proportionate costs of each phase of the budget, the court will have regard to the factors set out at CPR 44.3(5) and CPR 44.4(3):

**Practice Direction 3D**

*5. In deciding the reasonable and proportionate costs of each phase of the budget the court will have regard to the factors set out at Civil Procedure Rules 44.3(5) and 44.4(3) including a consideration of where and the circumstances in which the work was done as opposed to where the case is heard...*

*12. When reviewing budgeted costs, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.*

24. CPR r.3.18 makes clear that, where a costs management order has been made, when assessing costs on the standard basis, the court will:

*(a) have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings;*

*(b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so; and*

*(c) take into account any comments made pursuant to rule 3.17(3) and recorded on the face of the order.*

*(Attention is drawn to rules 44.3(2)(a) and 44.3(5), which concern proportionality of costs.)*

25. In the words of Davis LJ in Harrison, CPR r.3.18(b), CPR r.3.15(2)(b) is 'a significant fetter on the court having an unrestricted discretion: it is deliberately designed to be so. Costs judges should therefore be expected not to adopt a lax or over-indulgent approach to the need to find "good reason": if only because to do so would tend to subvert one of the principal purposes of costs budgeting and thence the overriding objective.'

## B.1 Purpose of costs budgeting

26. Knowing where the parties stand in advance has consistently been trumpeted as a key advantage of, and as a justification for, costs budgeting. It is fundamental to both the purpose and effectiveness of costs budgeting. Speaking extra-judicially, in his Harbour Lecture in 2015, Jackson LJ described the '*first benefit of costs management*' as knowledge of the financial position in advance:

*'They have clarity as to (a) what they will recover if they win (difference between own actual and recoverable costs), (b) what they will pay if they lose (own actual costs + other parties' recoverable costs). In many cases the litigation costs form a substantial part of what the parties are arguing about. This information is of obvious benefit for those taking decisions about the future conduct of litigation.'*

27. Giving judgment in Harrison, Davis LJ (with whom the other members of the Court agreed) emphasised the benefit of the parties knowing their costs liabilities (subject to good reason to depart) in advance and said (at [32]) that allowing a departure from the budget without good reason would remove '*the element of certainty to clients (in the form of knowing what costs they are likely to face, in terms of payment or recovery)*'.

28. In Harrison, Davis LJ also highlighted the following, at [32]:

(a) As said in Cook on Costs 2017, pp 230–231, '*the aims of costs budgeting include a reduction in detailed assessments and of issues raised in points of dispute; and that the element of certainty to clients (in the form of knowing what costs they are likely to face, in terms of payment or recovery)*...';

(b) As posed by Master Gordon-Saker in Collins v Devonport Royal Dockyard Ltd (unreported) 8 February 2017, at para 24: '*what would be the point of costs budgeting (and the considerable resources it has required) if the resulting figures amount to nothing more than a factor, guidance or cap at detailed assessment?*'

29. In Sharp v Blank [2015] EWHC 2685 (Ch), Nugee J referred to various benefits of costs management, as identified by Sir Rupert Jackson, at [25]. On the facts of that case, the real advantage of budgeting was the ability of the claimants to know what their exposure was for the defendants' costs, particularly with regard to obtaining ATE:

*'26. It seems to me that the real advantage of budgeting in this case, and the one which Mr. Hutton put at the forefront of his submissions, is the ability of the claimants to know what their exposure was for the defendants' costs. That would enable them to form a view as to whether the ATE insurance, if obtained, is sufficient or not, something which he said would ultimately be to the benefit of the defendants as well as to the benefit of the claimants themselves. I accept that that is a real and tangible benefit. I also accept that, although the defendants have, through Miss Davies, offered to provide estimates of costs, that would provide less high quality information to enable the claimants to assess their continuing exposure for costs as the litigation progresses. Those are the pros.'*

30. The correct approach to the question in this appeal is to consider the harmonious construction of the relevant provisions and, particularly, the purpose of both s.106 and the costs management provisions themselves.

### **C. GROUND 1: APPLICATION TO COSTS MANAGEMENT**

31. In short, both the plain words and purpose of s.106 lead only to the conclusion that the provision must apply to any decision of the Court on costs management. Dr Parsons submits that those are the governing canons of construction and are dispositive.
32. However, as explained below, that conclusion is only fortified by other applicable principles of statutory interpretation, as well as by common sense and regard to the practical consequences, as well as, in interpreting and applying the costs management provisions themselves, the purpose of those provisions and the overriding objective.

#### **Same test as on assessment**

33. It is not just accepted by Convatec, but positively asserted by them, that the test to be applied on determining costs budgets reflects the same test to be applied when assessing costs on the standard basis (paragraph 9 of Convatec's Note on s.106 [Supp/22/229]) – although the Court is obviously not carrying out a detailed assessment. Given that s.106 would obviously apply to assessing costs on the standard basis, there is no reason why s.106 should not equally apply to costs budgeting. Indeed, not to apply s.106 to costs budgeting is irrational – both in principle and on the Judge's own reasoning.

*No temporal limitation*

34. As accepted by the learned Judge, s.106 can apply throughout the course of proceedings, including interlocutory costs decisions (Judgment at [16] [Core/18/118]). So, there is no temporal limitation to its application nor any temporal sensitivity, such as to justify the Judge's decision, either in the plain words of the section or as a matter of practice.

*The critical path to a decision on costs*

35. As also accepted by the Judge, without deciding it, that '*there might be occasions where a court is "determining ... what costs or expenses to award" even if its decision does not either fix an amount of costs payable or a basis on which costs are to be determined*' (at [17] [Core/18/118]), as noted above, the Judge appeared to misunderstand the concept of the critical path to making a decision, in concluding as he did at [18] [Core/18/118-119].

*Nature of a decision on the basis of assessment*

36. When making a costs order at the end of proceedings, the Court will normally decide on the *incidence* of costs (which party pays the other) and the *basis* upon which the costs ordered to be paid are to be assessed if not agreed.
37. It goes without saying that s.106 would clearly apply to both of those elements of the costs order made at the end of a trial.
38. The same analysis would apply to a costs order made at an interlocutory stage.
39. The striking point here is that a decision on the *basis* upon which costs are to be assessed falls well short of a decision as to the *amount* in which those costs are ultimately to be assessed, which (subject to good reason to depart) is normally what a costs management order, approving a costs budget, is intended to do and does. So, in that respect, the costs budgeting order goes *further* than an order as to the basis of assessment.
40. There is no reason why s.106 should apply to the determination of the basis on which costs are assessed, but not to the determination of costs budgets.

41. Looked at another way, the decision as to the *basis* upon which costs are to be assessed sets up a presumption, by imposing the *burden of proof* on the claiming party. By contrast, an order approving a costs budget goes further by setting up a presumption as to the *amount to be paid* and (subject to good reason to depart) and pre-determining the reasonableness and/or proportionality of costs, in some detail, so that the parties can know where they stand on costs in advance and parties can consider and obtain any necessary ATE cover.

*Knowing where the parties stand in advance*

42. As made clear above, knowing where the parties stand in advance is central to the purposes of the costs management provisions, so it is a surprising result that, on the Judge's analysis, those provisions should stand in the way of giving Dr Parsons any such insight into the future costs, at this stage. The Judge's decision in the present case provides no clarity on the application and impact of s. 106, leaving the application and impact of s.106 up in the air until the end of the trial.
43. So, with respect, the learned Judge's decision flies in the face of the purpose of the costs management provisions just as much as the purpose of s.106 itself.

*The natural and ordinary meaning of section 106*

44. Dr Parsons relies on the plain words of the statute. They are clear. The natural and ordinary meaning of "*determining... what costs or expenses to award*" encompasses all steps on the critical path to determining what sum one party should pay to the other by way of costs. It is not confined to the making of a final order as to the precise amount to be paid by a Costs Judge, just as it is not confined to the making of an order as to the incidence of costs (i.e. who should pay) or the basis upon which those costs are to be assessed. By parity of reasoning, **s.106** applies to any costs management order. Such an order is an essential part of the process of determining the final sum of costs to be paid, just as a decision on the incidence of costs or the basis of assessment forms part of that process too. All such orders fall within the scope of application of s.106.
45. Section 106(1) expressly provides that it is engaged whenever the court is '*determining whether to award costs or expenses to any party and what costs or expenses to award*'.

46. The process of determining '*what costs or expenses to award*' involves, when assessing costs on the standard basis, deciding whether costs are reasonable and proportionate (CPR r.44.4(1)(a)). As Convatec itself asserts (as noted above), the test when approving a costs budget is essentially the same – although Convatec successfully argued that, in one exercise, s.106 *does* apply but, in the other, it *does not*.
47. Where no costs management order has been made, the process of determining '*what costs or expenses to award*' will take place after the trial, during summary or detailed assessment (CPR r.44.6).
48. However, where the court approves a costs budget, the process of deciding whether costs are reasonable and proportionate, and therefore the process of determining '*what costs or expenses to award*', is brought forward to the costs management conference so that the need for, and scope of, detailed assessments would potentially be reduced.
49. In Merrix v Heart of England NHS Foundation Trust [2017] EWHC 346 (QB); [2017] 1 W.L.R. 3399 per Carr J (as she then was) held, at [68], the court '*is identifying what future costs are reasonable and proportionate*', and see Harrison (*supra*) per Davis LJ at [33]-[34].
50. The process of the court determining what future costs are reasonable and proportionate in approving a budget (which will, unless there is good reason otherwise, bind the parties) is clearly, at the very least, part of the process of '*determining... what costs or expenses to award*'. It cannot rationally be said not to be.
51. As noted above, CPR 3.18(b) provides that the court '*will not depart from [the] approved or agreed budget unless satisfied that there is good reason to do so*'.
52. The fact that a court can later depart from an approved costs budget in these limited circumstances, under CPR 3.18(b), cannot mean that s. 106 does not apply to costs budgeting. It can be seen from the above that the effect of costs management on the budgeted costs is to provide a *default figure* on detailed assessment from which the court will only depart in very limited circumstances. That is plainly (at the very least) *part of the process* of the determination of the amount ultimately payable. Indeed, it is effectively *the whole of that process*, where there is no good reason to depart from the budget. So, not to apply s.106 at that stage is irrational. And leaving its application

to the end of the case defeats the purpose of achieving certainty in advance, as explained above.

53. The wording of s. 106 is clearly not limited only to applying where the Court is making a final determination as to the amount of costs to be paid. If that was Parliament's intention, it could and would have said so. It did not. Indeed, the wording of s.106(1) can be contrasted with s.106(2), which only applies '*If in any such proceedings the Patents Court directs that any costs of one party shall be paid by another party*', and therefore shows that, on any view, s.106(1) was framed in deliberately wider terms.
54. The wording of s.106 is, if anything, notably broader than other provisions in the Act, such as s.63(2). The premise for s.63(2) is found in s.63(1), namely that there has already been a finding that "*the patent is only partially valid*". In those circumstances, the court or comptroller shall take into account certain matters "*when awarding damages, costs or expenses or making an order for an account of profits*". There is no such antecedent premise in s.106 confining its application in that way, and thus the framing of s.106 is therefore notably broader.
55. If Parliament wanted s.106 only to apply when awarding costs at the end of a trial, as appears from s.63(2), it could and would have said so, e.g. '*the court, when awarding costs after dismissing a claim under s.40, shall have regard to all the relevant circumstances, including the financial position of the parties.*' It did not do so and the plain words support Dr Parsons's construction of s.106.

**The meaning of the word 'determine'**

56. The meaning of the word 'determine' was considered in Taylor v Evans [2023] EWHC 2490 (KB), albeit in a different context, namely s.114(1) of the Equality Act 2010, which provides that '*The county court or, in Scotland, the sheriff has jurisdiction to determine a claim relating to...*'. The Court held at [83] that, when construed in the relevant context, it was clear that the word 'determine' in s.114(1) of the Equality Act 2010 includes all steps to reach a determination. The words '*to determine*' usually includes managing to a determination [84]. Similarly, but in a quite different context of the limitations on challenging decision of High Court under the Arbitration Act 1996, in Czech Republic v Diag Human SE & Anor [2023] EWCA Civ 1518, [2024], 1 WLR 3593, the Court of Appeal

held (at [39], cf. [35]) that '*Deciding whether to order security is part of the process of determining a challenge under section 67, 68 or 69.*' Likewise, the word '*determining*' in s.106 must include all steps in determining what costs to award, not only the final order for costs to be paid in a specific sum.

### **Qualified One-Way Costs Shifting**

57. While there is a lack of authority on the application of s.106, there are a number of cases in which the scope of other provisions making special provision for costs have been considered.

58. One example is the Qualified One-Way Costs Shifting (QOCS) regime which, like s.106, was introduced to balance access to justice for individuals by ensuring that they can pursue a specific type of claim, namely personal injury claims, without risking financial ruin and without having to take out ATE insurance policies to cover adverse costs. When faced with a choice between a construction which broadens the application of the QOCS regime, and another which narrows its application, the Courts have consistently adopted the broader interpretation specifically to give effect to its purpose:—

58.1. In Wickes Building Supplies Ltd v Blair [2020] EWCA Civ 17; [2020] 1 W.L.R. 1246, the Court of Appeal held that, having regard to the purpose of the QOCS regime, the word '*proceedings*' in CPR r.44.13 included both the first instance proceedings and any subsequent appeal [28]. Per Baker LJ at [29]:

*'...The purpose of the QOCS regime is to facilitate access to justice for those of limited means. As Edis J observed at paragraph 3 of his judgment in Parker v Butler , if a claimant's access to justice is dependent on the availability of the QOCS regime, that access will be significantly reduced if he is exposed to a risk as to the costs of any unsuccessful appeal which he may bring or any successful appeal a defendant may bring against him. It follows that, as Edis J noted at paragraph 17 of his judgment, to construe the word "proceedings" as excluding an appeal would do nothing to serve the purpose of the QOCS regime...'*

58.2. In Cartwright v Venduct Engineering Ltd [2018] EWCA Civ 1654; [2018] 1 W.L.R. 6137, the Court of Appeal held that CPR r.44.14(1) did not permit a defendant to enforce an order for costs out of damages payable to the claimant under the schedule to a Tomlin order. Per Coulson LJ at [9]: '*It should be*

*emphasised that one of the principal purposes of QOWCS is to provide some assistance to claimants with personal injury claims.'*

- 58.3. In Ho v Adekun [2021] UKSC 43; [2021] 1 W.L.R. 5132, the Supreme Court held that CPR r.44.14(1), properly construed, did not allow the court to order that the parties' costs liabilities be set off against each other. Per Lord Briggs and Lady Rose JJSC at [31]: *'The purpose of QOCS is tolerably clear, to seek to rebalance an inherently tilted playing field'*. At [44]:

*'Any apparent unfairness in an individual case such as this dispute between Ms Ho and Ms Adekun is part and parcel of the overall QOCS scheme devised to protect claimants against liability for costs and to lift from defendants' insurers the burden of paying success fees and ATE premiums in the many cases in which a claimant succeeds in her claim without incurring any cost liability towards the defendant.'*

- 58.4. In Challis v Bradpiece [2024] EWHC 1124 (SCCO), it was held that QOCS regime applied to detailed assessment proceedings following the settlement of a personal injury claim and precluded a defendant from enforcing a costs order in its favour. Per Deputy Costs Judge Roy KC at [65-66]:

*'65. Of all the competing arguments, in my judgement the most compelling are that the defendant's interpretation would (i) go wholly against the grain of the Supreme Court's analysis in Ho ; and (ii) potentially leave the claimant with a net costs liability for the defendant's costs.*

*66. This in my view would be contrary to the legislative intention. See, in addition to Achille, supra , Coulson LJ in Cartwright v Venduct Engineering Ltd [2018] EWCA Civ 1654; [2018] 1 W.L.R. 6137 (emphasis added):*

*8. Although in some ways the QOWCS regime reflects the pre-1999 Legal Aid scheme, it represents a major departure from the traditional principle that costs follow the event and that, save in unusual circumstances, the losing party pays the winning party's costs. The QOWCS regime provides that, subject to limited exceptions, a claimant in a personal injury claim can commence proceedings knowing that, if he or she is unsuccessful, he or she will not be obliged to pay the successful defendant's costs ...'*

### **S.106 in accordance with its legislative purpose**

59. S.106 must be construed so as to implement, rather than defeat, the legislative purpose.

60. The purpose of s.106 is clearly to mitigate the potential adverse consequences of the (likely, if not almost inevitable) financial asymmetry between employer and employee inventor in s.40 proceedings.<sup>3</sup> That includes, most importantly, ensuring that a claim under s.40 is not so expensive for an inventor that it is likely to deter, or even prevent them from being able to bring a claim at all, or render pursuit of it close to pointless.
61. Convatec's construction of s.106, to the effect that it can only be taken into account on the final order as to costs (or final assessment of the costs in a costs managed case) is not only inconsistent with the natural and ordinary meaning of the section, but would also defeat, rather than implement, the legislative purpose, and allow Convatec to circumvent the provision.
62. If s. 106 does not apply to costs management, the court will not have regard to the financial position of the parties when setting budgets, and may approve a substantial budget for the defendant employer that goes far beyond the inventor's ability to pay in the event his claim is unsuccessful. That matters because, if Convatec is right, any available relief might very well be too late since, before then and without relief under s. 106 at the costs management stage, the inventor would be forced to either seek ATE insurance at significant cost, which might render the claim futile even if successful, or risk bankruptcy. Even worse, the inventor may not be able to obtain ATE insurance to cover the defendant's budgeted costs, and in turn be unable to secure funding, which would prevent him from being able to bring the claim at all. The purpose of s. 106 would thus be substantially, if not in many circumstances, entirely, defeated.
63. By contrast, Dr Parsons' construction would implement the legislative purpose by ensuring that, where there is an extreme financial asymmetry between the parties, this does not deter, or even prevent, the employee inventor from being able to bring a claim under s. 40.

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<sup>3</sup> Dr Parsons contends this is clear. However (*quod non*), if necessary, reference to Pepper v Hart material makes this clear from the context. Dr Parsons does not accept that there is any relevant ambiguity in the plain words of s.106, but if Convatec contends otherwise, this would provide an additional basis upon which to consider the Pepper v Hart material.

*Adverse consequences for Dr Parsons, Convatec, and the law generally*

64. When considering which of two opposing constructions corresponds to the legal meaning of an enactment, the court should assess the likely consequences of adopting each construction, both to the parties in the case and (where similar facts arise in future cases) for the law generally. If on balance the consequences of a particular construction are more likely to be adverse than beneficial this is a factor telling against that construction (R. (on the application of Democracy Newham Ltd) v Newham LBC [2021] EWHC 150 (Admin); per Morris J at [34], citing *Bennion, Bailey and Norbury on Statutory Interpretation* (8th Ed.) at §11.6).
65. In addition to the adverse consequences for Dr Parsons set out above, delaying consideration of s. 106 would nullify the two celebrated benefits of costs budgeting, namely securing greater predictability of outcome on costs recovery and reducing the time involved in, and costs of, the assessment process. If Convatec is right, in every s. 40 claim where an inventor was unsuccessful, there would inevitably be a subsequent contested hearing to address s. 106, which could result in the defendant recovering no costs, or substantially reduced costs, even if successful.
66. Convatec's construction of s. 106 would thus render costs management in s. 40 claims (costs management is the default position in claims valued below £10 million) futile, to the detriment of both parties and the law generally. By contrast, Dr Parsons' construction gives effect to the twin benefits of costs budgeting.

*Section 106 and costs management*

67. When s.106 was enacted and when these provisions in the Act came into force on 1 June 1978, costs budgeting did not exist. When amendments were made to these provisions in 2004, costs budgeting did not exist. However, that does not mean that s.106 does not apply to costs budgeting.
68. Acts are usually regarded as '*always speaking*', unless there is good reason to think otherwise. It is presumed that the legislature intends the court to apply a construction that allows for changes that have occurred in the law since the Act was initially framed (News Corp UK & Ireland Ltd v Revenue & Customs Commissioners [2023] UKSC 7, [2024] AC 89 at [29]).

69. When s.106 was enacted, Parliament clearly intended to allow for changes in court rules as to costs, such that s.106 is 'always speaking'. The contrary cannot sensibly be argued.
70. To be clear, there has plainly been no change in primary legislation. However, it is obviously the case, as identified above, that the costs management provisions now found in the CPR did not exist when s.106 was first enacted.
71. The fact that, following the introduction of cost management in 2013, part of the process of determining what costs to award is now dealt with, in advance, at a costs management conference, rather than only after trial, does not mean that s. 106 does not apply to costs budgeting. On the contrary, s. 106 did not identify specific Rules of the Supreme Court to which it applied and there is no good reason, in principle, for any new costs rules to fall outside its scope.
72. Furthermore, procedural rules of court will not be construed to override primary legislation or to defeat or undermine its effect, and, in any event, there is no warrant for that in s.106 or in the costs management provisions themselves. Indeed, as highlighted above, the purpose of the costs management provisions themselves speaks strongly in favour of the application of s.106 at the stage of costs budgeting, for the reasons already set out above.

### Legal Aid

73. It may be relevant background context to have in mind that, in 1977, the Legal Aid Act 1974 had recently been enacted. It consolidated previous provisions and provided for funding of own costs and costs protection for adverse costs, typically resulting in so-called '*football pools*' orders, which precluded enforcement of costs orders without leave of the court and were practically equivalent to no order for costs. This provision of both support and costs protection was means-tested, as they were supported from public funds (the latter only where an order might be made out of public funds). By contrast, **s.106** only makes provision for the financial disparity to be taken into account only in relation to costs, and only as between the parties (i.e. not involving public funds). Furthermore, s.106 is directed to a particular type of claim, rather than

claimant. Parliament clearly saw no injustice in leaving s.106 in place, even when the availability of legal aid changed radically. Indeed, in 2004, its reach was expanded.

#### D. GROUND 2: EFFECT OF SECTION 106 ON COSTS MANAGEMENT

74. The learned Judge held that there was an extreme asymmetry between the financial position of the parties: *'I have had evidence as to Dr Parsons' financial position. From that, I am quite satisfied that his means are modest and limited. He certainly has nowhere near the resources of Convatec.'* (Judgment at [33] [Core/18/121]) A glance at the Confidential Schedule illustrates that well.
75. Notwithstanding that, the Judge nonetheless concluded that even if s.106 did apply to costs budgeting, he would not make any adjustment to Convatec's costs budget.
76. Dr Parsons respectfully submits that the learned Judge's decision in that regard:
- (a) was vitiated by the errors inherent in Ground (1) above;
  - (b) could not possibly serve the identified purpose of the statutory provision;
  - (c) paid no real (or plainly insufficient) heed to the realities of an individual employee inventor litigating, funding and insuring a case such as this; and/or
  - (d) was, with respect and in all the circumstances, not even an available conclusion.
77. Stepping back, in result and in its practical implications, the Judge's decision was plainly wrong.
78. Dr Parsons submits that the effect of s. 106 is that Convatec's approved costs budget should be substantially reduced in the manner set out below, or in such other manner as the Court may think fit to meet the circumstances of this litigation. Obvious available approaches include the following:–
- 78.1. **Scale costs applicable in the Intellectual Property Enterprise Court:** It is notable that in s.106(2) the court has the power, if it directs *'that any costs of one party shall be paid by another party'*, to direct that costs be allowed in a lump sum or *'that costs shall be taxed on a scale published by the court, being a scale of costs*

*prescribed by rules of court.*' In this regard, there are scale costs for proceedings in the Intellectual Property Enterprise Court ('IPEC') pursuant to CPR 46.20(4) and as set out in Tables A and B. While it is accepted that the costs managing court is not directing that the costs of one party shall be paid by another party yet, it is contended that there is no reason why the costs managing court could not approve the costs in the form of the aforesaid scale costs and/or subject to 'good reason' to depart on eventual assessment. This would enable Dr Parsons to have access to justice in the light of the extreme financial asymmetry between the parties and the very particular powers of s.106 in claims brought under s. 40 (not available in general litigation not covered by s. 106).

- 78.2. **The limit of Dr Parsons' existing ATE insurance cover:** This would ensure that the litigation is not so expensive for Dr Parsons that he is deterred, or even prevented, from being able to pursue his claim, and that if he is successful, he does not have to forfeit his 'fair share' awarded under the Act or the lion's share of that 'fair share'. At the time of the hearing before Richards J there was approximately £664,000 of cover available in relation to a liability to pay Convatec's costs: see Clarke 3 at [16] [Supp/19/188].
- 78.3. **A proportion of Dr Parsons' costs budget:** As set out in Clarke 3 at [27] [Supp/19/190], for every £1,000 spent by Dr Parsons on litigation costs, he has to pay £1,200 (including VAT) whereas for the same value of work done for Convatec, Convatec pays only £750. That is because Convatec does not have to pay VAT as it can recover it (which Dr Parsons cannot) and Convatec offsets the cost against its liability to corporation tax, so saving another 25% (which Dr Parsons also cannot do). But that is only part of the story; if Dr Parsons is successful in his claim, Dr Parsons then has to pay a success fee out of his damages of up to 100% of his profit costs (i.e. up to £2,400 in the example above), which is approximately *three times* the amount Convatec pays for the same value of work done. And all that is before taking into consideration (i) the cost of a deferred ATE premium (typically between 50% to 65% of the amount insured) and (ii) if he obtains third-party litigation funding, a potential third-party funder's typical return of 2 to 5 times its capital outlay, in addition to the outlay itself. In the hypothetical scenario set out in Clarke 3 at [35]

[Supp/19/191-192], if Dr Parsons was awarded a fair share of, say, £15 million under s. 41, once he had paid the above sums, he would be left with just 20% of the fair share awarded to him by the Court. To provide a truly level playing field, it is therefore contended that Convatec's budget should be fixed at no more than 25%, or perhaps 33% of Dr Parsons' budget to get anywhere close to giving effect to the purpose of s.106.

## **E. CONCLUSION**

79. The learned Judge's decision on the application of s.106 was plainly wrong, as was his assessment of the order he would have made had it applied.
80. The effect on these proceedings is serious and, given the impending need to make decisions as to funding and ATE insurance, is 'urgent'.
81. Against that background, Dr Parsons now asks this Court to allow the appeal and to make an order that gives real and practical effect to the purpose of s.106, so as to substantially reduce Convatec's approved budget as the Court may think fit.

**PATRICK GREEN KC**

**17 July 2026**

**BEN NORTON**