

Appeal Ref: CA-2026-000805

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON 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
MR JUSTICE RICHARDS

BETWEEN:

DR DAVID PARSONS

Appellant / Claimant

and

CONVATEC LIMITED

Respondent / Defendant

**RESPONDENT'S REPLACEMENT SKELETON ARGUMENT
ON THE S. 106 APPEAL**

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References to paragraphs in the Judgment below are in the form “J[paragraph]”; references to paragraphs in the Appellant’s Skeleton Argument are in the form “A[paragraph]”.

Introduction and Summary

1. In this appeal, the Appellant challenges the Costs Management Order of Richards J (the “**Judge**”) dated 16 February 2026. In that Order, the Judge determined the future costs that it is reasonable and proportionate for the parties to incur in this case in the conventional way. In doing so, he decided in a reserved Judgment that s. 106 of the Patents Act 1977 (the “**1977 Act**”) has no effect on the costs management (or budgeting) exercise. S. 106(1) provides that, in proceedings such as these, “*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.*” The Judge went on to decide that, even if s. 106 does apply to costs budgeting, on the facts of this case it would not have altered the budgeted costs he approved in his Costs Management Order.
2. This appeal arises in a claim for employee compensation under s. 40 of the 1977 Act. The Appellant is a chemist who was employed by the Respondent for 32 years. During that time, the Respondent filed dozens of patents in relation to a product line of wound dressings (AQUACEL), of which some bear the Appellant’s name either as the sole or a joint inventor, and some do not bear his name at all. His claim is that the Respondent derived an outstanding benefit from seven families of such patents. The Appellant has not yet quantified his claim, but the logic of his pleaded case is that the claim is worth up to £366 million.¹
3. There are two Grounds of Appeal. By Ground 1, the Appellant contends that the Judge erred in his construction of s. 106 itself. His case is that s. 106 does apply to costs budgeting.
4. It is common ground that the court is not, at the costs budgeting stage, determining “*whether to award costs*”.² The Appellant’s case is that, in determining costs budgets, the court is nevertheless “*determining ... what costs (...) to award*”. The Respondent disagrees. That is the question of statutory construction for this court under Ground 1.
5. Ground 1 should be dismissed because, on its proper construction, s. 106 only applies when the court is making an interim or final order for costs. Determining “*what costs to award*” is logically subsequent to determining “*whether to award costs*” – the latter comes before

¹ J2.

² J10(i).

the former. Therefore, the court cannot determine “*what costs to award*” without having first determined that it will award costs. Given that the Appellant accepts that, in costs budgeting, the court is not determining, and has not previously determined, whether to award costs, it follows that it cannot be determining what costs to award.

6. The Court of Appeal has already decided, in a reasoned order in the *Shanks v Unilever* litigation, that s. 106 has no application at the stage of seeking a costs protection order “*as opposed to when costs are awarded*”. That proposition of law is consistent with the Respondent’s construction set out in the previous paragraph. It is, by contrast, inconsistent with the Appellant’s position on statutory construction. This court is therefore bound by previous authority to dismiss the appeal on Ground 1.
7. The Judge was also right to conclude that, when costs budgeting, the court is not engaged in determining *what costs* (i.e. quantification) to award based on the specific exercise the court is carrying out in costs budgeting. As the Judge set out at J13, the role of the costs budgeting regime (in CPR 3 Section II) is for the court to determine, for future or budgeted costs, “*the reasonable and proportionate costs of each phase of the budget*”; and that “[i]n doing so, it will have regard to the factors set out in CPR 44.3(5) and 44.4(3) ...”. As the Judge also said at J19, “[t]he costs and disbursements that it is reasonable and proportionate for Convatec to incur in this case are the same whatever Dr Parsons’ financial position.” When budgeting, the court is simply not permitted, by reference to the parties’ means, to identify a lower figure than that which it regards as reasonable and proportionate. The Appellant has no answer to this: his skeleton argument does not explain how, conceptually, the costs which it is reasonable and proportionate for the Respondent to incur can be (dramatically) reduced by reference to his financial position.
8. Even if he succeeds on Ground 1, the Appellant must also succeed on Ground 2 in order for the Judge’s order to be disturbed. By Ground 2, the Appellant contends that the Judge was wrong not to make any adjustment to the Respondent’s costs budget if, contrary to his conclusion on statutory construction, s. 106 does apply to costs budgeting.
9. Ground 2 therefore challenges a discretionary case management decision. This court is only entitled to interfere with that decision if it is persuaded that the Judge erred in principle, or left out of account a material factor that he should have taken into account, or took into account an immaterial factor, or that the exercise of his discretion was “*wholly wrong*”.

10. The Appellant does not allege that the Judge made an error of principle in the part of his Judgment challenged by Ground 2. Neither is it contended that the Judge's decision was "*wholly wrong*". The Judge carefully went through each of the three alternative proposals put forward by the Appellant for reducing the Respondent's approved costs budget, at J34-J40, and gave entirely appropriate reasons for rejecting them having considered all material factors (and no immaterial factors). Ground 2 should therefore be rejected.
11. It is striking that the Appellant's case as set out in his appeal skeleton argument is internally inconsistent. In his argument on Ground 1 (A53), he seeks to rely on what he contends is a distinction between subsections (1) and (2) of s. 106 resulting from a deliberate difference in drafting. He says the result is that subsection (1) applies to costs budgeting, whereas subsection (2) does not. However, he then positively seeks to rely on subsection (2) in support of his case on Ground 2 (A78.1). In particular, he expressly relies on s. 106(2) in support of his primary alternative approach to costs budgeting if s. 106 does apply, namely that the Respondent's costs should be limited to the scale costs applicable in the Intellectual Property Enterprise Court ("**IPEC**"). This striking inconsistency shows that the Appellant cannot present a coherent and plausible case on s. 106 and its application that results in any change to the Judge's order.
12. Ultimately, the Appellant's failure to put forward any alternative outcome without obvious and serious shortcomings itself illustrates why he is wrong in his construction of s. 106 in the first place. It is simply impossible for a court when costs budgeting to do anything other than approve the parties' reasonable and proportionate costs, without causing very substantial unfairness and significant procedural difficulties which the Appellant has failed to address.

Background to the s. 106 appeal

13. The Appellant's contention is that his claim has a value in excess of £10 million (albeit that the Claim Form is not so endorsed). As a result, it would not normally be subject to costs management (CPR 3.12(1)(a)). However, the parties agreed at a relatively early stage in the litigation that there should be costs management in this case.
14. It was the Appellant who proposed that costs management should apply. The principal reason given was that, in order to protect himself (and, of course, the Respondent) in respect of any adverse costs order, it was well-understood that the Appellant required ATE insurance cover. The Appellant obtained such a policy at an early stage in the litigation, and, following

correspondence between the parties as to the adequacy of that cover, the Appellant disclosed limited information about the ATE policy to “reassure [the Respondent] that [the Appellant] has arrangements in place to satisfy any adverse costs order made against him” and represented to the Respondent that “[t]he level of that cover will need to be reviewed once the court has made a costs management order”.³ The Appellant however did not indicate his intention to rely on s. 106 at the costs budgeting stage prior to obtaining the Respondent’s agreement that the case would be subject to costs management.⁴

15. Pursuant to the parties’ agreement that costs management would apply to these proceedings, budgets and budget discussion reports were filed and exchanged before the Case Management Conference in this action, which took place before Mellor J over two days in November 2025. In the event, on the first day of that hearing Mellor J postponed costs management, there being insufficient time to address it as well as the other CMC issues and a strike out application. A separate Costs Management Conference was subsequently listed.⁵
16. The parties then filed and exchanged revised budgets and new budget discussion reports. By that time (19 December 2025), the Appellant had incurred just under £2.7 million in costs and sought approval of a further £5.3 million in future costs.⁶ The Respondent had incurred £4.2 million and sought approval for £10.2 million in future costs.⁷
17. Before and at the CMC in November 2025, the Appellant indicated that, before costs budgeting would be considered, he intended to make a “costs protection application” relying *inter alia* on s. 106 [SUPP/12/136, **T1/58/10-14**]. In the event, the Appellant never made any application (under s. 106 or otherwise). However, he did ask the court, at the Costs Management Conference held before the Judge, to apply s. 106 when carrying out costs management and sought a range of orders, each of which would have the effect of reducing the Respondent’s (and only the Respondent’s) approved budgeted costs very significantly

³ Appellant’s solicitors’ letter dated 15 January 2024 [SUPP/28/325].

⁴ In fact this reason for costs budgeting was not indicated until some two years later. Respondent’s solicitors’ letter dated 26 January 2024 [SUPP/28/326]. Appellant’s solicitors’ letter dated 3 November 2025 [SUPP/28/353].

⁵ Listing Order of Mellor J dated 14 November 2025, paragraph 1 [SUPP/13/145].

⁶ Claimant’s Revised Amended Costs Budget dated 19 December 2025 [SUPP/14/147].

⁷ Defendant’s Revised Costs Budget dated 19 December 2025 [SUPP/15/154].

below the reasonable and proportionate level that would be approved if s. 106 were not applied.

18. The Appellant served evidence for the Costs Management Conference setting out details of his financial position and the means by which he has been able to pursue this litigation as an individual litigant. In that evidence, it was clear that his ATE cover was at the time very significantly below the level of costs that had already been incurred by the Respondent in defending the claim (and the Appellant in pursuing the claim). In fact, taking into account the Appellant's projected disbursements, the Appellant's ATE policy as it then stood would not cover any of the Respondent's costs at all if the case went all the way to trial.⁸
19. The procedure followed before and at the Costs Management Conference was as follows:
 - (a) Following concerns expressed by the parties as to the time estimate for the hearing, the Judge suggested to the parties that they send a short statement of their respective positions on s. 106 only, with a bundle of authorities bearing on the point, shortly before their main skeleton arguments were due to be filed. The parties filed such statements and authorities as per the Judge's suggestion [SUPP/21/217] [SUPP/22/227].
 - (b) At the hearing itself (a full day on 30 January 2026), the Judge first conducted a "traditional" costs budgeting exercise assuming that s. 106 was inapplicable and strictly without prejudice to the Appellant's position that s. 106 was applicable. He gave an oral ruling following the conclusion of that exercise ([2026] EWHC 300 (Pat)) [CORE/17/99]. The sums agreed or approved are in Annex 1 to the Order under appeal [CORE/16/94]. The total future costs approved were approximately £4.7 million for the Appellant and £6.5 million for the Respondent.
 - (c) The Judge then heard argument on both issues relating to s. 106, namely whether it applies at all to costs budgeting and, if it does, how it would affect the sums approved pursuant to the traditional costs budgeting exercise. The Judge reserved judgment at the end of that hearing and handed down the Judgment (the subject of this appeal) two weeks later (on 16 February 2026) [CORE/18/113]. The result was that there was no alteration to the sums approved by the court in the traditional costs budgeting exercise.

⁸ Third Witness Statement of Laura Jennifer Whiting, paragraph 63(iii) [SUPP/20/212].

The Judgment

20. The Judge set out the two issues before him in J10. Issue (i) was the point of statutory construction (Ground 1). Issue (ii) was the application of s. 106 to costs budgeting in this case if s. 106 did apply at this stage (Ground 2); and at J10(ii), the Judge set out the three specific reductions sought by the Appellant to the Respondent's budget, which correspond broadly to the three advanced on this appeal at A78.1-A78.3.
21. At J13, the Judge summarised the matters which the parties agreed constituted the nature of the task that the court performs when approving costs budgets. They included, at (iii) that “[t]he court’s role is to determine the reasonable and proportionate costs of each phase of the budget.”
22. The Judge addressed and determined issue (i) at J14 to J30. He concluded at J25 that s. 106 did not require him to have regard to the Appellant’s financial position when approving either side’s costs budget. At J26-J30, the Judge considered the reasoned order of Floyd LJ in *Shanks v Unilever*, concluding at J30 that while it was consistent with his own analysis, he did not consider it to be binding on him.
23. At J31-J40, the Judge went on to consider issue (ii), whether, if, contrary to his conclusion on statutory construction, s. 106 did apply, he should make any of the three specific orders that the Appellant had proposed. At J33, the Judge noted he was quite satisfied, based on the evidence, that the Appellant’s means are modest and limited and that the Appellant has nowhere near the resources of the Respondent.
24. However, the Judge dismissed each of the Appellant’s proposed orders on the basis that s. 106 required the court to take into account all circumstances, not just the Appellant’s financial position (J35). The key circumstances taken into account by the Judge were the following:
 - (a) The Appellant chose to bring his claim in the High Court rather than IPEC, which enabled him to seek compensation of £366 million and allowed the court to list the claim for a 27-day trial (J35).
 - (b) The Appellant had based his claim on each invention that he allegedly made, each patent that resulted and any combination of patent and invention, such that the Respondent will have to spend a great deal of time and money to defend it (J37).

- (c) While the Judge accepted that, on a post-tax basis, costs bear more heavily on the Appellant than the Respondent, one of the reasons why the Respondent's budgeted costs are higher is because they have more work to do than the Appellant (J39).
25. At J40, the Judge concluded that, even if he was required to consider s. 106 at the costs budgeting stage, he would not adopt any of the suggestions put forward by the Appellant and would prefer to wait until later in the process when all relevant circumstances, including financial position, could be considered.

Ground 1

26. Ground 1 raises a question of statutory construction. It therefore involves a question of law which has a right or wrong answer. The specific question for the court, given the common ground noted in paragraph 4 above, is: When making a costs management order, is the court “*determining ... what costs... to award*” for the purposes of s. 106(1)?

General principles of statutory construction

27. The fundamental approach was set out recently by the Supreme Court in ***R (O) v Secretary of State for the Home Department*** [2022] UKSC 3; [2023] AC 255, in which Lord Hodge DPSC, giving the leading judgment, stated at [29]-[31] (insofar as relevant and omitting citations):

“The courts in conducting statutory interpretation are “seeking the meaning of the words which Parliament used” ... More recently, Lord Nicholls of Birkenhead stated: “Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context”. Words and passages in a statute derive their meaning from their context ... A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained ...: “Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.”

External aids to interpretation therefore must play a secondary role. ...

Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered ...”

28. In ***R (Quintavalle) v Secretary of State for Health*** [2003] 2 AC 687, Lord Bingham of Cornhill stated as follows at [8]:

“The court’s task, within the permissible bounds of interpretation, is to give effect to Parliament’s purpose.”

29. When construing an enactment, regard should be had to the consequences of each proposed construction.⁹ The courts will generally avoid adopting a construction that produces an absurd result, since that result is unlikely to have been intended by the legislature. The concept of “*absurdity*” has been held to include virtually any result which is impossible, unworkable or impracticable, inconvenient, anomalous, futile or pointless, artificial, or productive of a disproportionate counter-mischief.¹⁰

General purpose of s. 106

30. While s. 106(1) also applies to other types of claims, as the Judge noted in J12, both sides accepted that s. 106(1) was expressed to apply to disputes under s. 40 of the 1977 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 was therefore clear to the Judge that a purpose of s. 106(1) was to give the court tools that would “*reduce the risk*” that a concern about an ultimate costs award would operate as a disincentive to employees bringing claims under s. 40. The Respondent understands this to be common ground.¹¹ The

⁹ ***Bennion, Bailey and Norbury on Statutory Interpretation***, 9th Ed. at §10.7, cited with approval in ***Project Blue v HMRC*** [2018] UKSC 30; [2018] 1 WLR 3169, Lord Briggs at [110] (referring to §9.6 in a previous edition).

¹⁰ ***Bennion***, at §13.1; ***Project Blue***, Lord Hodge at [30].

¹¹ See A60. As the Judge noted, this also means that it is not necessary to refer to *Hansard*. The Appellant refers to “the *Pepper v Hart* material” in footnote 3 without citing anything specific. Obviously there is nothing in *Hansard* on whether it was intended that s. 106 would apply to costs budgeting because costs budgeting did not exist at the time that s. 106 was debated.

word “*reduce*” is however to be emphasised, because the purpose is not to eliminate the risk to the employee claimant altogether that at the conclusion of proceedings they might have to pay their employer’s reasonable and proportionate costs. Indeed, it would be most unfair if an employee (who may gain third party litigation funding) could litigate without being at any such risk, whatever their conduct in the litigation and whatever turned out to be the merits of their claim.

The text of s. 106(1) of the 1977 Act itself

31. In its current form, s. 106(1) of the 1977 Act reads as follows:

“(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.”

32. The Respondent’s case is that a court can only determine “*what costs ... to award*”¹² after it has determined “*to award ... costs*”. That is because “*what costs ... to award*” is an exercise in quantification, which only arises once the court has determined to make an award of costs.¹³ In other words, determining what costs to award is logically subsequent to whether to award costs.

33. This interpretation is entirely consistent with J9, in which the Judge took the parties to agree that the conjunction “*and*” in s. 106(1) simply means that the court must consider financial circumstances both when considering whether to award costs and when considering what costs to award. The court commonly approaches (and approached at the time s. 106 was enacted) costs in two stages: (1) should any order for costs be made at all; and (2) if so, what order should be made? S. 106 mandates that regard must be had to the financial position of the parties (as well as all other relevant circumstances) at both those stages. However, it does not follow that the court can consider what costs to award without having first determined to award costs (which is the Appellant’s case). It cannot.

34. It follows that there is only one point at which s. 106 applies (and at which the court is therefore required to have regard to the parties’ financial position): when the court decides

¹² References to “*expenses*” are omitted, as this concerns only proceedings in Scotland.

¹³ Respondent’s Notice, paragraph 2 [CORE/12/80].

whether and what costs order to make. Whilst there is no temporal limitation, so that s. 106 applies to any such decision throughout the course of proceedings,¹⁴ all this means is that s. 106 applies when the court decides to make an interim as well as a final costs order.

35. That interpretation has two material consequences. First, contrary to what the Judge was prepared to *assume* in the Appellant’s favour at J17, there are no occasions where a court is “*determining what costs to award*” if its decision does not either fix an amount of costs payable or a basis on which costs are to be determined. The example the Judge gave was a decision as to where a case management hearing at which questions of costs are to be debated should take place, or whether it should take place in person or remotely. However, this does not involve deciding whether to award costs. Moreover, it is not necessary for s. 106 to apply in order for the court to have regard to the financial position of the parties when making such decisions: it can do so under CPR 1.1(2)(c)(iv).¹⁵
36. Second, s. 106 does not apply when costs are being assessed. That is because when a costs judge (or any judge) is assessing costs, they are not awarding costs. Rather, the costs judge is quantifying costs which have already been awarded. Any other approach would give rise to the nonsensical position that the very same costs are awarded twice: first by, for example, the trial judge after trial making an order for costs which are to be assessed, and, second, by the costs judge who conducts the assessment.
37. In the modern context, this distinction between awarding and assessing costs is reflected in the language of the CPR. Thus, CPR 44.2, which addresses an award of costs, refers repeatedly to an “*order*” as to costs. By contrast CPR 44.3, which defines the standard and indemnity bases for assessment, refers to the court’s function being to “*assess*” costs. Also CPR Part 47, which addresses the procedure for detailed assessment, only refers to a costs judge making an “*order*” in relation to costs in CPR 47.20 when addressing the costs of the assessment proceedings themselves (which the costs judge awards at the end of the assessment).

¹⁴ J16; A34.

¹⁵ By contrast, CPR 44.4 is a closed list of factors to be taken into account in assessing reasonable and proportionate costs, which does not include the financial circumstances of the parties: see *Coventry v Lawrence* [2015] UKSC 50; [2015] 1 WLR 3485, Lord Neuberger PSC at [79]-[81], referring to CPR 44.5 as it was then.

38. In any event, where a judge has made an award of costs, the assessing judge has no jurisdiction to depart from that order, which is in substance what the Appellant is contending for when he suggests (at A33) that s. 106 can be invoked during detailed assessment proceedings. If, for example, the judge orders that a claimant pays (100% of) the defendant's costs on the standard basis, the costs judge cannot invoke s. 106 to depart from that. As it was put in *Cope v United Dairies (London) Ltd* [1963] 3 WLUK 62; [1997] Costs LR (Core Vol) 23 p.24 “*the taxing master ... had no option but to comply*” and “*the taxing master could not properly refuse to carry out an order for taxation, in whole or in part ...*”. The Court of Appeal confirmed in *Lahey v Pirelli Tyres Ltd* [2007] EWCA Civ 91; [2007] 1 WLR 998 at [23] that “*the costs judge has no power to vary the costs order that is deemed to have been made*”, and in *O’Beirne v Hudson* [2010] EWCA Civ 52; [2010] 1 WLR 1717 at [19] “*a costs judge has no power to alter the order for costs made by the judge*”.
39. It follows that s. 106 can only be invoked when a judge makes the costs order, or award. By contrast, s. 106 cannot be invoked (or invoked again) on a detailed assessment following from that order, for the simple reason that the costs judge conducting an assessment is not “*award[ing]*” costs.
40. Furthermore, if s. 106 can be invoked repeatedly at different points in an action, that would produce obvious incoherence, uncertainty and unfairness.

Other provisions of the 1977 Act

41. The words in s. 106(1) must be read in the context of the section as a whole, including s. 106(2). The Appellant accepts that s. 106(2) does not apply to costs budgeting. Nonetheless, he seeks in A53 to rely on the difference in wording between ss. 106(1) and 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*”. However, the more natural reading is that s. 106(2) provides two specific options for the Patents Court¹⁶ to order if it directs that the costs of one party shall be paid by another party, i.e. s. 106(2) is engaged at the second stage of s. 106(1) (namely determining what costs to award) having passed through the first stage of s. 106(1) (determining whether to award costs, and in particular having determined to make a costs order *as opposed to* making no order as to costs). It is highly unlikely that Parliament intended the two subsections to apply to different stages of relevant proceedings brought

¹⁶ As opposed to proceedings in IPEC or the Scottish courts, to which s. 106(1) but not s. 106(2) applies. The Judge drew this distinction between these two provisions at J8.

under the 1977 Act. Given that the Appellant accepts that s. 106(2) does not apply to costs budgeting, it must follow that s. 106(1) does not either.¹⁷

42. The Appellant also relies on the difference between the wording of ss. 63(2) and 106(1).¹⁸ The Judge dismissed this argument in J16 and the Appellant has not explained why he was wrong to do so.

Giving effect to the purpose of s. 106

43. Having analysed the text of s. 106, it is necessary to ask: how did Parliament intend by using those specific words to achieve the purpose of the legislation as set out in paragraph 30 above?
44. The answer was given by the Judge in J21: s. 106(1) offers “*some reassurance to both sides to an action under s. 40 that financial position will be taken into consideration when deciding whether to award costs or what costs to award*”.¹⁹ That, however, is as far as it goes. It does not give reassurance in advance as to *how* financial position (as well as other “relevant circumstances”) will be taken into account or what the specific outcome will be, let alone that there will be a reduction in the amount payable.
45. That the reassurance it gives does not go that far is evident from the fact that, in 1977, at the time s. 106 was enacted, there was not even a potential mechanism by which financial position could be considered before a costs award was made. Costs budgeting did not exist at the time and would not exist for some 35 years after it was enacted. It must be assumed that in 1977 s. 106 was regarded as achieving its purpose.
46. Moreover, even now, s. 106 applies to cases not subject to costs budgeting (which would have included this one, absent the Respondent’s agreement). Again, it must be assumed that s. 106 still achieves its purpose in those cases.

Application to costs budgeting

47. The foregoing is the context in which the specific question for the court under Ground 1 arises: When making a costs management order, is the court “*determining ... what costs...*

¹⁷ Elsewhere the Appellant implicitly accepts that ss. 106(1) and (2) apply to the same stages of litigation by invoking s. 106(2) in his argument on Ground 2, contrary to its case on Ground 1.

¹⁸ A54-A55.

¹⁹ The quotation in A11(10) is not accurate.

to award” for the purposes of s. 106(1)? The Appellant’s position is that “*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 otherwise is clearly part of the process for determining “what costs to award” (and on the critical path to doing so) within the meaning of s. 106”* (A13).

48. The Appellant is wrong for five reasons. The first is based on the analysis of the words in s. 106(1) itself: see paragraphs 32 to 34 above. In order to determine what costs to award, the court must first determine whether to award costs to a party. It is common ground that when costs budgeting, the court is not determining whether to award costs. In the absence of that determination, it cannot be determining what costs to award either.
49. The second reason is based on what costs budgeting actually involves. Again, it is common ground that the process involves deciding what costs it is reasonable and proportionate for a party to incur (see J13(iii) and A13). This is conceptually different from deciding what costs to award.
50. Moreover, the paying party’s financial position cannot on any view have any effect on what costs it is reasonable and proportionate for a party to incur. The Appellant does not suggest otherwise. Parliament cannot have intended that something be taken into account which could not have any effect on the outcome. The Judge rightly recognised this in J19.
51. A fallacy which runs through the Appellant’s arguments is that s. 106 enables the court to re-write what is meant by standard basis, or reasonable and proportionate, costs. That is a misreading of s. 106: it does not purport to give the court any power to redefine what is meant by standard basis, or reasonable and proportionate, costs. Rather s. 106 gives the court power, where it would otherwise have made an award of, for example, (100% of) standard basis costs, to make a different order (for example, no order, only a percentage of standard basis costs, a fixed sum, or scale costs). However, the meaning of standard basis, or reasonable and proportionate costs, does not change.
52. Third, a court can only “*have regard to all the relevant circumstances, including the financial position of the parties*” at the point when the court actually awards costs, because only at that point are all the “relevant circumstances” known.²⁰ Those circumstances must include, for example, the parties’ conduct before and during the proceedings, whether a party

²⁰ Respondent’s Notice, paragraph 3 [CORE/12/80].

has been successful in proving part, if not all, of its case, and whether any effort was made to settle the case.²¹ However, these “*circumstances*” of course cannot possibly be considered until the point when the court decides what costs award to make, typically (but not exclusively) at the end of proceedings. It is telling that the Appellant’s skeleton is silent on how the court is supposed to consider “*all the relevant circumstances*” at the costs budgeting stage under his proposed construction. Of course, the parties’ financial positions may also have changed between the time of costs budgeting and the time at which costs are awarded, which might affect the outcome of the application of s. 106.²²

53. It follows that the Appellant’s construction is likely to lead to an unfair result in a significant number of cases. Again, that cannot have been Parliament’s intention.
54. Fourth, the Appellant’s construction of s. 106 stands contrary to the well-established principle that a court does not decide costs awards pre-emptively in advance (subject to certain exceptions which do not apply here, such as the costs of trustees).²³ If Parliament had intended to create an exception to this well-established principle, then that intention would have been clearly stated in the words used.
55. Fifth, contrary to A44, the natural meaning of “*determining*” does not “*encompass[...] all steps on the critical path to determining what sum one party should pay to the other by way of costs*”. Rather, the natural meaning of “*determining*” in this context is that it applies only to the point of decision.

The reasoned order in *Shanks v Unilever*

56. The Respondent’s case is that the Court of Appeal’s reasoned order in *Shanks v Unilever* was binding on the Judge (and, with respect, on this court) and disposes of Ground 1.²⁴
57. The Judge addressed this order in J26-J30. In determining an application for a costs protection order under what was then CPR 52.9A(1) (now CPR 52.19), Floyd LJ held that:

²¹ See § 106.03 of the UK IPO’s *Manual of Patent Practice*.

²² That is entirely possible in the Appellant’s case: he is considering litigation funding and may well have been able to secure that by the time costs are awarded and/or obtain further ATE protection and/or a CFA from his counsel team.

²³ See generally the discussion in *Civil Procedure 2026*, Vol. 1, §44.2.11 and Vol. 2, §9A-202.

²⁴ Respondent’s Notice, paragraph 5 [CORE/12/80].

“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.”

58. Thus, it has been decided that (a) s. 106 does not apply at the stage of costs protection but, by contrast, (b) it does apply when costs are awarded. It would be inconsistent to decide, in the Appellant’s favour, that s. 106 does apply to costs budgeting in circumstances where it is common ground that the court is not awarding costs at that stage.
59. The Appellant’s answer to this is not clear. There is no answer for the following reasons:
- (a) The Appellant is wrong to suggest that this decision was made “*at the PTA stage*” (A14). Permission to appeal was granted by Floyd LJ on 17 June 2015. In the order granting permission, Floyd LJ gave directions for the application for a costs protection order. Therefore, the reasoned order in question came after the PTA stage.
 - (b) While it is correct that there was no oral argument, Floyd LJ received written submissions from both parties on the issue.²⁵ The point was therefore argued before the court.
 - (c) The decision is not *obiter*, because s. 106 was relied on in support of a one-way costs cap; and therefore, the dismissal of the s. 106 argument was crucial to arrive at a cap on each party’s costs.
 - (d) ***JJ Food Service Ltd v Zulhayir*** [2013] EWCA Civ 1304; [2014] CP Rep 15 (A16) is not on point: it deals with an entirely different issue as to the timing of an application under CPR 52.9A.

The purpose of costs budgeting

60. The Appellant complains that the Judge’s and the Respondent’s construction defeats the purpose of costs budgeting (A42-A43). Even if this could be an aid to the construction of s. 106, it is wrong. The Judge’s and the Respondent’s construction of s. 106 does not mean that it was futile for the court to have determined, at the costs budgeting stage, what would be the reasonable and proportionate costs for the Respondent to incur. That determination

²⁵ See amended transcript, **T122/6-123/4** [SUPP/26/303].

meant that the Appellant knew his likely maximum exposure;²⁶ and that ought to have helped him obtain an appropriate level of ATE insurance cover.²⁷ Of course, this was the Appellant's original stated justification for subjecting these proceedings to costs budgeting.²⁸

61. Furthermore s. 106 does not apply to the vast majority of cases subject to costs budgeting. It cannot sensibly be suggested that the purpose of costs budgeting is defeated in each of those cases.

Statute “always speaking”

62. In general, a legislative provision is regarded as “always speaking” in the sense that a statute should be interpreted taking into account changes that have occurred since the statute was enacted.²⁹ However, that does not support the Appellant's construction. In particular:
- (a) As addressed at paragraph 45 above, the fact that costs budgeting did not exist at the time s. 106 was enacted shows that s. 106 achieves its objective without being applied at the costs budgeting stage.
 - (b) The Appellant's construction wrongly presupposes that costs budgeting is a new form of determining “*what costs to award*”. It is not, for the reasons set out above.

²⁶ This gives precisely the degree of assurance which costs budgeting is intended to give. Incidentally, the quotation from *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792; [2017] 1 WLR 4456 at [60], rather than [61] as referenced in A11(3), is misplaced because it is addressing the issue of when a case is “*commenced*” for the purposes of CPR 44.3(7)(a).

²⁷ It is right (A29) that in *Sharp v Blank* [2017] EWHC 141 (Ch); [2017] 4 WLR 184, Nugee J (as he then was) at [18] recognised this as an advantage of costs budgeting. However that advantage is not absolute, because an indemnity basis costs award might be made, so that CPR 3.18 would not be engaged and the budget would not apply, or the costs judge on assessment might depart from the budget for “*good reason*”.

²⁸ Appellant's solicitors' letter dated 15 January 2024 [SUPP/28/325].

²⁹ *News Corp v HMRC* [2023] UKSC 7; [2024] AC 89, Lord Hamblen and Lord Burrows at [28] and [29].

Consequences of the Respondent's construction

63. When construing an enactment, regard should be had to the consequences of each proposed construction (see paragraph 29 above). The consequences of the Respondent's construction are fair, reasonable and consistent with the purpose of s. 106. If and when the court decides whether to make a costs order (interim or final), it will at that stage (likely in the context of a contested hearing) be required to have regard to all the relevant circumstances, including the financial position of the parties. The Appellant will at that stage be entitled to rely on his relative lack of means (if this remains his financial position).

Consequences of the Appellant's construction

64. By contrast, the Appellant's construction would have a number of negative consequences, which Parliament is unlikely to have intended. In particular:
- (a) It is unclear on the Appellant's case whether, if s. 106 is applied at the costs budgeting stage, it can also be applied after the trial, when the court is determining the costs of the proceedings. If s. 106 is applied again after trial, then this significantly undermines the Appellant's case that his construction provides certainty. In particular, if the Appellant's financial circumstances change (for example, he obtains litigation funding or receives a significant windfall in the interim), does that mean that the Respondent can recover more than his budgeted costs? What effect does the Appellant's conduct since budgeting have on the Respondent's costs recovery? The Appellant does not grapple with these complexities.
 - (b) Furthermore, the Appellant does not grapple with how s. 106 would apply to costs incurred prior to budgeting. These incurred costs, which are very significant on both sides (£4.2 million for the Respondent), are not approved by the court as part of the costs budgeting process; so s. 106 cannot be applied to them at the budgeting stage. The Appellant's position would therefore seem to be that the court will have to apply s. 106 twice: once for budgeted costs at the budgeting stage, and then for incurred costs after trial. That would be wholly incoherent. Again, it would anyway mean that the Appellant will not have any certainty in relation to incurred costs until the end of proceedings.
65. This confirms the Respondent's argument that the court can only "*have regard to all the relevant circumstances, including the financial position of the parties*", at the point when it actually awards costs, because only at that point are all the relevant circumstances known.

The Appellant's authorities

66. At A56, the Appellant relies on *Taylor v Evans* [2023] EWHC 2490 (KB) and *Czech Republic v Diag Human* [2023] EWCA Civ 1518; [2024] 1 WLR 3593. As the Judge pointed out in oral argument, these are both jurisdiction cases.³⁰ All *Taylor* decided was that if a court has jurisdiction to determine an issue, then it can also deal with case management decisions leading up to that determination (in any event it is the decision of a Master and so not binding). The decision in *Diag Human* (in particular at [36]-[41]) was that an appeal under a provision “*ancillary*” to ss. 67-69 of the Arbitration Act 1996 was to be construed as a decision under those sections. Those decisions are not on point.

Qualified one-way costs shifting (“QOCS”)

67. The Appellant seeks to derive support from certain authorities on QOCS. QOCS was introduced as a special rule for costs in personal injury cases only. Its effect is that, as its name states, “*costs shifting*” is only one way, i.e. a defendant can be required to pay a claimant’s costs, but (subject to specific exceptions) a claimant cannot be required to pay a defendant’s costs.
68. The QOCS regime is thus a specific exception to the otherwise ubiquitous position that, where costs are recoverable at all *inter partes*, costs shifting is two ways, i.e. each party can potentially be required to pay the other party’s costs. The QOCS regime has no application here.
69. Furthermore, the cases decided in respect of the QOCS regime are not, as the Appellant boldly suggests (A57 to A58), any sort of aid to the construction of s. 106. The four decisions cited by the Appellant all relate to issues specific to the proper construction of the QOCS regime. In any event, insofar as the courts adopted a broader as opposed to narrower interpretation of the QOCS regime in three of the four decisions relied on by the Appellant, these decisions were then specifically and deliberately reversed by amendments to the CPR, which demonstrates a Parliamentary intention to narrow the effect of the QOCS regime.
70. In *Wickes Building Supplies Ltd v Blair* [2020] EWCA Civ 17; [2020] 1 WLR 1246 the Court of Appeal’s conclusion was that the reference in the QOCS regime to “*proceedings*”

³⁰ T100 [SUPP/26/298].

included appeals. That is unsurprising but equally obviously it is irrelevant to the issues on this appeal.

71. In *Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654; [2018] 1 WLR 6137, the Court of Appeal emphasised the limits of the application of the QOCS regime. Thus, immediately after the words at [9] quoted at A58.2, Coulson LJ said of one of the principal purposes of QOCS:

“It is not to penalise their prospective defendants. So I disagree ... that a central feature of the regime is that defendants “would have to stand their own costs in unsuccessful claims”. That might be a common outcome of the [QOCS] regime, but it is not its principal purpose or intent. If a defendant can bring itself within rule 44.14(1), then it can recover its costs.”

72. There were two issues in *Cartwright* (see [1]). The first issue was whether QOCS prevented enforcement by a defendant of its costs out of damages which the claimant had been awarded against a different defendant; the court held not at [35]. Thus, the court accepted the construction which narrowed rather than broadened the application of QOCS. It was only because the court adopted this narrower approach on the first issue that the second issue arose, namely whether the defendant could enforce against a sum payable under a Tomlin order, rather than under an order for damages. It is right to say that the court concluded at [44] that QOCS did not permit this, on the basis that the schedule to a Tomlin order is not an “*order for damages*”; but said at [40] that the decision was not “*entirely easy*”. Furthermore, this decision was reversed by amendment to the CPR so that r 44.14 now refers not only to an order for damages but also “*agreements to pay or settle a claim*”. Thus, insofar as the court construed QOCS broadly, this has been reversed.
73. The Appellant is right to say that in *Ho v Adekun* [2021] UKSC 43; [2021] 1 WLR 5132 the Supreme Court held that the QOCS regime, as it then stood, prevented the parties’ costs liabilities being set off against each other. However, again, the Appellant omits that this decision was reversed by amendment to the QOCS regime, so that CPR 44.14 now refers to orders or agreements for “*damages, costs and interest*” (emphasis added).³¹

³¹ Civil Procedure (Amendment) Rules 2023 rule 24. The Explanatory Note, alluding to *Cartwright* and expressly referring to *Ho*, said the amendments were “*to allow the court in cases*

74. ***Challis v Bradpiece*** [2024] EWHC 1124 (SCCO) is the non-binding decision of a deputy costs judge (on the issue whether QOCS applies to detailed assessment costs) and (as the quotation in A58.4 confirms) its conclusion is based on the now-reversed decisions in ***Cartwright*** and ***Ho***. As the deputy costs judge recognised at [19]-[20], his conclusion could not apply under the amended QOCS regime.

Legal Aid

75. Finally, the Appellant seeks (A73) to rely on the facts that: (a) in 1977, the Legal Aid Act 1974 had recently been enacted; and (b) Parliament left s. 106 in place “*even when the availability of legal aid changed radically*”. This is a new argument not run below. These facts are obviously irrelevant to the interpretation of the words in s. 106 and the question of whether it applies to costs budgeting.

Conclusion on the point of statutory construction

76. For all the above reasons, the Judge was correct to decide that s. 106 did not require him to have regard to the Appellant’s financial position when approving either side’s costs budgets.

Ground 2

77. The standard of review for Ground 2 is very different to that for Ground 1, as Arnold LJ recognised when granting permission to appeal. Ground 2 challenges a discretionary case management decision, moreover one concerning costs. The test on appeal for such decisions was set out by Hickinbottom LJ in ***Atlasjet Havacilik v Kupeli*** [2018] EWCA Civ 1264; [2019] 1 WLR 1235 at [5] as follows (omitting citations):

“i) *In considering orders for costs, the court is of course bound to pursue the overriding objective as set out in CPR rule 1.1, i.e. it must make an order that deals justly with the issue of costs as between the parties. Therefore, when considering whether to make a costs order – and, if so, the order it makes – the court has to make*

falling within the scope of the qualified one-way costs regime to order that the parties’ costs liabilities be set-off against each other, Ho v Adekun [2021] UKSC 43 having previously found that this rule, properly construed, did not allow the court to do so; and... to include within this rule, as well as deemed orders, agreements to pay damages or costs, so to allow the off-setting of costs orders made in favour of a defendant and ensure that offers made under Part 36, and, for example, settlements concluded by way of a Tomlin Order, come within the rule”.

an evaluative judgment as to where justice lies, on the facts and circumstances as it has found them to be.

ii) Before an appeal court will interfere with the exercise of that discretion, as with any appeal, it must be satisfied that the decision of the lower court was wrong or unjust because of a serious irregularity in the proceedings below. ...

iii) Before an appeal court concludes that the costs decision below was “wrong”, it must be persuaded that the judge erred in principle, or left out of account a material factor that he should have taken into account, or took into account an immaterial factor, or that the exercise of his discretion was “wholly wrong”. ...

iv) An appeal court will only rarely find that the exercise of discretion below is “wholly wrong”, because not only is that discretion particularly wide but the judge below is usually uniquely well-placed to make the required assessment, having heard the relevant evidence.”

78. Ground 2 does not set out what adjustment the Appellant contends for. The Appellant’s Notice is similarly silent.³² The position was the same below: the Appellant has never provided a draft of a specific order which reflects the costs management order he seeks. In A78, he submits that the effect of s. 106 is that the Respondent’s 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*”. It says “[o]bvious available approaches include the following”, and then gives the three proposals sought below.
79. This approach is abusive. The Appellant is required (both before the Judge and before this court) to set out the order which he contends the court should make so that the Respondent can focus its submissions on a concrete proposal (or small number of proposals).
80. At the very least, the scope of argument and the potential orders to be made by this court, must be limited to the three proposals set out in A78.1 to A78.3. In any event, the Appellant cannot realistically contend that the Judge was “*wrong*” not to make an order which he did not propose.

³² In Section 9, the Appellant seeks the following variation: “*Paragraph 3 of the Costs Management Order be varied, having regard to [s. 106], such that the [Respondent’s] costs budget be reduced to such sum as the Court may think fit.*” [CORE/9/63]

The Respondent's case on Ground 2 generally

81. Ground 2 should be dismissed because it falls far short of satisfying the test for an appeal of this nature as set out in paragraph 77 above.
82. In particular:
- (a) It is not alleged that the Judge erred in principle. (The only error of principle alleged is that of statutory construction, which is Ground 1.) The Appellant asserts that the Judge's application of s. 106 was "*vitiated*" by his allegedly erroneous construction of s. 106 (A4 and A76(a)), but that is not sustainable: the Judge carefully directed himself at J32 to proceed on the basis that his construction was wrong.
 - (b) The Judge took into account all relevant factors. Crucially, he took into account the Appellant's financial position at the start (at J33) and then when considering each of the Appellant's three proposals (at J35, J37 and J39). He also took into account other relevant factors, as required by s. 106, as summarised in paragraph 24 above.
 - (c) It is not alleged that he took into account any immaterial factors.
 - (d) It cannot be sensibly suggested that the Judge's decision was "*wholly wrong*" in circumstances where the discretion is "*particularly wide*". In those circumstances, even if this court would have arrived at a different decision on the same evidence at first instance, it is not entitled to interfere with the Judge's decision.
83. In relation to (b) above, when granting permission to appeal, Arnold LJ concluded that it was arguable 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*" [CORE/13/82]. However, the Judge clearly took into account the Appellant's financial position at all relevant stages:
- (a) The Judge expressly recorded in J23 the Appellant's evidence that (a) his financial position was such that he could not bring the claim without further ATE insurance, (b) if the Respondent was given a high approved budget, the premium for that insurance would be so high that he would need litigation funding to pay the premium, and (c) this would run the risk of substantially diminishing the value of any award that he obtains if his claim succeeds. Importantly, it was not the Appellant's evidence that he

could not continue to pursue the claim at all if s. 106 was not applied to costs budgeting.³³

- (b) As the Judge went on to consider in J24, that was an articulation of the practical difficulties that the Appellant faces in this particular case, having chosen to bring a claim of such high value and complexity.

84. That is sufficient for the dismissal of Ground 2. In any event, each of the three specific proposals advanced by the Appellant must be rejected for the reasons given by the Judge.

Proposal (1): scale costs applicable in the IPEC

85. The Appellant's primary position is that the Respondent's budget should be approved in the form of the scale costs applicable in the IPEC in Table A of PD46 (A78.1). Recoverable costs in IPEC are subject to an overall cap of £60,000 (CPR 46.21(1)) and the maximum amount of scale costs that the court will award for each stage of the claim are as per Table A of PD46. Adding the scale costs for each stage relevant to these proceedings results in a total of £73,000.³⁴

86. The Judge rejected this proposal in J34 and J35. He was obviously correct to do so: the Appellant could have brought proceedings in the IPEC and benefited from the costs cap. He chose not to, presumably because that gave him clear advantages *inter alia* in terms of sums claimed and length of trial.³⁵ He also does not propose that his own costs be subject to the same cap (which they would be if he had brought these proceedings in the IPEC).

87. In support of this proposal (A78.1), the Appellant relies on s. 106(2) which refers to "*a scale of costs prescribed by rules of court*", of which the IPEC scale is an example. Yet, inconsistently, the Appellant accepts that s. 106(2) does not apply to costs budgeting.

Proposal (2): limit of the Appellant's existing ATE insurance cover

88. Next, the Appellant proposes that the Respondent's budget is approved at the limit of the Appellant's existing ATE insurance cover, which was taken out before 15 January 2024.³⁶

³³ Clarke 3, paragraph 20 [SUPP/19/189].

³⁴ CPR PD46, Table A.

³⁵ The value of a claim in the IPEC must not exceed £500,000 unless otherwise agreed by the parties (CPR 63.17A) and trial will usually not last more than 2 days (CPR PD63, para 31.2).

³⁶ Appellant's solicitors' letter dated 15 January 2024 [SUPP/28/325].

The Judge understood this to mean that the Respondent's budgeted costs should be set at £664,000 (J36), and the Appellant appears to confirm that this is the correct interpretation of his proposal (A78.2).

89. The Judge at J37 dismissed this proposal because it did not take into account the size of the Appellant's claim and the expansive way in which he has run it. Those are obviously relevant factors: the Appellant must share the consequences of those features of his claim.
90. At A78.2, the Appellant seeks to justify this proposal by saying this would "ensure that the litigation is not so expensive 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 or the lion's share of that "*fair share*". However, as noted above, the Appellant's evidence before the Judge was not that he would be prevented from pursuing this claim if this order were not made. His evidence was also silent as to: (a) whether he had sought to obtain higher cover, (b) how much that would cost in terms of premium, and (c) when and the terms under which that premium would be payable. In any event, the reality is that litigation insurance, and for that matter funding, operates in an established market and if a claimant is unable to obtain these, that is likely to reflect the merits of pursuing the claim. The practical effect of the Appellant's proposal would be to remove any requirement or incentive for him to seek additional ATE insurance beyond that which he has already obtained, and would set an arbitrary cap for the Respondent's costs based solely on the Appellant's own funding decisions taken at an early stage of the litigation.

Proposal (3): a proportion of *the Appellant's* costs budget

91. At A78.3, the Appellant proposes that the Respondent's budget should be fixed at "*no more than 25%, or perhaps 33% of [the Appellant's] budget*". Below, the Appellant only proposed a limitation of 1/3 of his budget and the Judge addressed this at J38. In doing so he expressly took into account the Appellant's evidence as to the effect of tax on the parties' respective costs expenditure.
92. The Judge rightly noted at J39 that this did not of itself explain why the Respondent's costs budget should be a proportion of *the Appellant's*. That would be completely arbitrary. He also rightly noted that he approved the Respondent's budget in a higher sum because it has more work to do than the Appellant in the litigation. Thus again, the Judge took into account all relevant factors and clearly came to a conclusion which cannot be characterised as "*wholly wrong*".

93. In any event, the Appellant’s assertion of what he has “*spent*” is unreal because his solicitors are acting on a conditional fee agreement and therefore he is not spending anything on solicitors’ fees.³⁷ He is not currently spending anything on counsel’s fees either – counsel’s fees have so far been paid exclusively from sums received pursuant to interim costs orders made against the Respondent.³⁸ Furthermore, if he is unsuccessful in his claim, then he will never have to pay any fees to his solicitors.
94. Each of proposals (1) to (3) could and should be rejected for the additional reason that the Appellant was in substance seeking a costs capping order that operated in one direction only.³⁹ If what was sought is in substance a costs capping order, then, as in *Shanks v Unilever*, to be fair, any cap should have applied to both parties. That was not what was sought by the Appellant (and is not even proposed now).

Conclusion on Ground 2

95. For all the above reasons, Ground 2 should be dismissed even if Ground 1 is allowed. The result is that the Judge’s order stands.

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28 August 2026

³⁷ Third Witness Statement of Laurence Adam Clarke, paragraph 22 [SUPP/19/189].

³⁸ Appellant’s solicitors’ letter dated 21 January 2026 [SUPP/28/356].

³⁹ Respondent’s Notice, paragraph 6. [CORE/12/81]