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The Quarterly Newsletter from **DEBORAH BURKE COSTING LIMITED** ~ Law Costs Draftsmen and Consultants

Tel: 01664 482866 Fax: 01664 482867 DX 26776 Melton Mowbray E-mail: enquiries@dbcosting.co.uk



Debbie Burke ~ Editor

The cfa regulations “broke” a long time ago. My view is that it all began to go wrong when it became possible to recover additional liabilities from paying parties. After a period of time which saw the level of technical challenges rising exponentially, the decision was taken to revoke the cfa regulations. End of problem ... or was it? In the last issue of **Costs Recovery News** we covered four cases where challenges had been made to the validity of pre 1st November 2005 cfa's. And guess what, in this issue, we look at another batch of decisions concerning the very same issue. We are now more than two years on from the abolition of the regulations but the system has not yet been flushed of the last remaining cases. So, for all pre November 2005 cfa's, please do not think for one moment that the danger of an enforceability challenge has passed.

I think there was wide acceptance that the legal aid system was in need of reform. However, the manner of the reform and its delivery have been a continuing theme during 2007. The reforms effective from 1st October 2007 are dealt with briefly in this newsletter and the pace with which the reforms are being implemented is heightening the feeling that the impact of the reforms has not been thought through sufficiently.

So, on the one hand we have had reform by abolition and on the other, reform by radical change pushed through at a frightening pace. We have certainly not yet seen an end to cfa challenges and we are no more likely to see anything like a period of stability for legal aid practitioners. In this situation, a good working relationship between firm and costs draftsman becomes even more important. At Deborah Burke Costing Limited, we place the highest possible emphasis on building and maintaining that

relationship. Our aim is to allow you to maximise your profitability. Working in partnership with our clients puts us in a unique position and an increasing number of our clients ask us for our input as they plan for the future. Just one of the many benefits of retaining us as your costs draftsmen.

***Looking forward to 2008, I send all of our readers, the compliments of the season and wish you a happy and prosperous new year.***



### Cases in Brief...

## Libel trial verdict returned in favour of Claimant

The trial for libel in this matter took place in June 2007 when a majority verdict was returned in the Claimant's favour, who was awarded £5,000.00 by way of damages. Further lengthy arguments took place with regard to the applicability of CPR 36.14(1)(b).

Prior to the trial, the Claimant had offered to settle the case for £4,999.00 plus an apology.

Under CPR Part 36.14(1)(b) unless it is considered unjust so to do, the court will order that a Claimant is entitled to his costs on the indemnity basis and interest on those costs at a rate not exceeding 10% above base rate where the judgment entered against the Defendant is at least as advantageous to the Claimant as the proposals contained in a Claimant's Part 36 offer.

The Court had to consider whether the judgment obtained against the Defendant could be characterised as being “at least as advantageous to the Claimant as the proposals contained in his Part 36 offer”. Mr Justice Eady considered that the threshold criteria set out in CPR 36.14(1)(b) had not been fulfilled.

He exercised his discretion and found that because the settlement did not include an apology, it was not as advantageous as the Part 36 offer previously made.

He therefore awarded the Claimant the costs of the action on the standard basis only, with no interest on damages or enhanced interest on costs.

*Martin Jones MP v Associated Newspapers Limited*  
[2007] EWHC 1489 (QB)



## Cases in Brief...

# Substantial aspects of claim rejected

In the case of **Aspin v Metric Group Limited**, Mr Aspin had issued proceedings for damages against Metric Group Limited. He put his claim at anything up to £400,000.00 of which at least £170,000.00 is without question. Although Mr Aspin won on some aspects of his claim, substantial aspects of his claim were rejected and the net total of the judgment for the Claimant including interest was £41,926.70.

The order for costs provided that there should be no order for costs as between the parties up to and including the date of the liability trial. Thereafter the Defendant was ordered to pay the

Claimant his costs to be subject to detailed assessment on the standard basis if not agreed.

Mr Aspin appealed the first part of the order for costs. The Court of Appeal found that the Claimant should have the costs of the issues on which he won, and quantified the same as 50% of the whole of the costs of the action. The original costs order was set aside and a new order was substituted which provided for the Claimant to have 50% of his costs up to the conclusion of the trial of liability and all of his costs thereafter.

*Aspin v Metric Group Limited*  
[2007] EWCA Civ 922



## Useful Information...

# Striking power

### CPR 3 - The Court's Case Management Powers

Under CPR 3.4 the Court has power to strike out a statement of case. Remember paragraph 1.9 of the Practice Direction supplementing this Rule states that:-

*Where a rule, practice direction or orders states 'shall be struck out or dismissed' or 'will be struck out or dismissed' this means that the striking out or dismissal will be automatic and **that no further order of the court is required.***

### The Civil Procedure (Amendment) Rules 2007 No. 2204

This Statutory Instrument came into force on 1st October 2007. Some of the principal changes are:-

- The amount of fast track trial costs has been increased in CPR 46.2(1).

Value of claim	Old figure for trial costs	New figure for trial costs
Not more than £3,000.00	£350.00	£485.00
More than £3,000.00 but not more than £10,000.00	£500.00	£690.00
More than £10,000.00	£750.00	£1,035.00

- The number of days within which a party can lodge an appeal from a decision of an authorised court officer relating to the detailed assessment of costs has been increased from 14 to 21 days.

- The additional amount payable where it was necessary for a legal representative to attend to assist the advocate (CPR 46.3(2)) has increased from £250.00 to £345.00 with the minimum amount under CPR 46.3(4) increasing from £350.00 to £485.00.



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- The effects of costs orders
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- Orders under CPR Part 44
- Public Funding
- The indemnity principle
- Terms of settlement
- The terms of experts' retainers
- Remuneration for non-contentious work
- The position in relation to in-house solicitors
- After the event insurance
- Wasted costs orders
- The effect of acceptance of Part 36 offers
- Security for costs
- Costs order against third parties

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Nathan Tavares  
Robert-Jan Temmink  
Paras Gorasia

David Grant  
Oliver Assersohn  
Eleanor Davison  
Michael Uberoi  
Saul Margo

For more information contact Stephen Somerville on 020 7353 6381  
stephen.somerville@outertemple.com

[www.outertemple.com](http://www.outertemple.com)



## Recent Cases...

# How long will this keep going on!

Some two years after the revocation of the cfa regulations, decisions relating to the enforceability of cfa's under that regime are still being handed down. Four cases were dealt with in the September edition of **Costs Recovery News** and here are another four!

### **Mrs Kirpal Jauer Dole v ECT Recycling Limited<sup>(1)</sup>**

This was an appeal from a decision that the Claimant's cfa was unenforceable because of a breach of Regulations 4(2)(c) and 4(2)(d).

The Claimant was a passenger on a bus operated by the Defendant. When the driver of the bus suddenly braked, a very large passenger fell on top of the Claimant's leg, breaking it in several places. The Claimant sued the bus company. The claim was pursued with the benefit of a cfa dated 15th July 2004 supported by after the event insurance.

The Defendant informed the Claimant's Solicitors in December 2004 that the Claimant, "as a passenger on one of our insured's buses, has the benefit of Before The Event Legal Expenses Insurance".

At the detailed assessment hearing, the Defendant maintained that by failing to advise the Claimant of the possibility of her taking advantage of the BTE insurance referred to in the Defendant's letter, the Claimant's solicitors had failed to comply with the obligation under Regulation 4(2)(c) to consider whether the client's risk of incurring liability for costs was insured under an existing agreement.

The senior partner of the Claimant's solicitors' firm and head of its personal injury department stated that:- "at the date when the CFA was signed ... it was

not common knowledge that the bus companies would have been covered by Before The Event Legal Expense insurance which would have been available for passengers to sue the bus company for the negligent driving of its own drivers." This statement was not contradicted by the Defendant.

Master Rogers, sitting as a Deputy District Judge of Uxbridge County Court found that "the state of knowledge of solicitors specialising in this field in the summer of 2004 was not that the defendants to a claim of this nature might have passenger cover, and in particular that such cover would be dealt with independently of any claim made against them by the passenger." Accordingly there had been no breach of either Regulation 4(2)(c) or 4(2)(d) and the cfa was accordingly valid and enforceable.

### **Roger Barlow v Lucy Ewart Perks<sup>(2)</sup>**

In this case, Master Rogers, this time sitting as a Deputy Judge of the Mayor's and City of London County Court, again had to decide whether the cfa entered into by the Claimant and his solicitors on 15th December 2004 was valid and enforceable because of alleged breaches of Regulation 4 of the now defunct regulations.

In May 2001 the Claimant had been riding his motorcycle when the Defendant negligently drove her vehicle directly across his path whilst she was attempting an illegal right turn.

The matter was compromised in August 2005 with the Defendant paying damages of £13,750.00 and costs.

Master Rogers found that the matter had

been conducted under three quite separate retainers: one with KSB and two with Irwin Mitchell. When the Claimant was represented by KSB Claims, the Claimant had the benefit of BTE insurance with Motor Law. When KSB Claims stopped dealing with personal injury work, the matter was transferred to Irwin Mitchell.

Master Rogers in a long and detailed judgment gives details of the various letters, etc. written in an attempt to clarify the position with regard to the transfer of the BTE policy and the subsequent decision to continue the case under a conditional fee agreement. "This has been an unusually difficult case to resolve because of the very complicated factual position which I felt it necessary to set out at some length in this judgment" [paragraph 112]. Master Rogers found that the Claimant had never been told that because Irwin Mitchell were not on the KSB Claims panel, his BTE insurance was no longer available to him following his transfer to Irwin Mitchell. He had been given only two options, to continue the case as a private client, or to enter into a cfa. He was not told that it might be possible to find another firm of panel solicitors to deal with the case. As a result, Regulation 4(1)(a) and 4(1)(b) had not been complied with. This was a material non-compliance which had adversely affected both the client's position and the administration of justice generally.

As a result, the cfa was found to be unenforceable and it followed that Irwin Mitchell could not recover any of the costs claimed under the same.

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Continued on Page 4

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## ***Daive Galitzky v Vizards Wyeth (a firm)***<sup>(3)</sup>

Master Gordon-Saker was tasked with deciding four issues at the outset of the detailed assessment hearing.

- 1) whether the CFA entered into between the Claimant and his solicitors was one to which Regulation 3A of the cfa regulations applied
- 2) if so, whether there was any breach of the regulations
- 3) if so, whether any breach was material; and
- 4) if the agreement was enforceable, whether the success fee claimed was reasonable and if not, what a reasonable success fee would be.

The Claimant and his solicitors had entered into a cfa "lite" to enable the Claimant to take professional negligence proceedings against the Defendant. Regulation 3A introduced the so called cfa "lite". A cfa "lite" is a cfa where the client is liable to pay his legal representative's fees and expenses **only to the extent**

that sums are recovered in respect of the relevant proceedings, whether by way of costs or otherwise. A cfa lite is, of course, exempt from the requirements of regulations 2, 3 and 4 of the cfa regulations.

Master Gordon-Saker found that the cfa was not an agreement to which Regulation 3A applied because the Claimant had taken on "a liability to pay his solicitor's expenses ... **whatever the outcome.**" However, he also found that there was no breach of the regulations and it followed that he was not called upon to decide whether any breach was material.

With regard to the level of the success fee, the cfa provided for a 75% success fee, which Master Gordon-Saker took to reflect a 57% chance of success. He found that this was unduly pessimistic and that the claim was highly likely to succeed on liability with the only risk being on quantum, specifically, the risk of failing to beat a Part 36 payment or offer. "In my view the prospects of success should have been put at 80%, which would justify a success fee of 25% [paragraph 70]".

## ***Lisa Barham v (1) Dr Athreya (2) Barking, Havering & Redbridge NHS Trust***<sup>(4)</sup>

A decision by Master Simons to reduce the success fee claimed from 100% to 67% was appealed on the grounds that the judge had failed to consider **all** the factors that had been taken into account when the success fee had been assessed and had also misdirected himself by suggesting that a 100% success fee would not be allowed unless a CFA provided for a review of the risks at various stages, whereby giving an opportunity for the success fee to be increased.

High Honour Judge Dean QC sitting with Master Campbell stated that he could find nothing to fault in Master Simons' reasoning *if one reads this judgment sensibly it is perfectly apparent, ... that the costs judge was directing his attention (i) to the individual agreement, (ii) in general terms a staged agreement was more likely to find favour for a high success fee than one which simply assumed it or took it right from the very beginning.* [paragraph 61]

Ref 1. [2007] EWHC 90086 (Costs)

Ref 2. [SCCO Ref: 0606555 - 19th October 2007]

Ref 3. [2007] EWHC 90083 (Costs)

Ref 4. Central London County Court: Case No. CNC05021

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## Useful Information...

# Don't panic! - Code condensed

The Solicitors' Code of Conduct 2007 is big. Really big. You just won't believe how vastly, hugely, mind-bogglingly big it is. You may think it took a long time to read the Practice Rules, but that's just peanuts compared to the Code of Conduct.

Humble apologies to the late, great Douglas Adams, but given the size of the new Code, it seems appropriate to paraphrase his description of the enormity of space. At a whopping 257 pages, the Code is heavy-going. This article is intended to give you a brief run-down of the costs provisions in the Code (contained in Rules 2.03 and 2.04), and the way in which they differ from the previous Costs Information & Client Care Code 1999.

Costs Information & Client Care Code 1999	Code of Conduct 2007 (nb: clauses are shown out of order to show equivalence with the old Code)
<b>Costs Information</b>	
"Costs information must not be inaccurate or misleading"	
"Any terms with which the client may be unfamiliar should be explained"	"Any information about the cost must be clear"
"The information ... should be given to the client at the outset of, and at appropriate stages throughout the matter"	"You must give your client the best information possible about the likely overall cost of a matter both at the outset and, when appropriate, as the matter progresses"
"All information given orally should be confirmed in writing to the client as soon as possible"	"Any information about the cost must be clear and confirmed in writing"
"The solicitor should give the best information possible"	"You must give your client the best information possible ..."
"The solicitor should explain clearly to the client the time likely to be spent in dealing with a matter" <i>[if time is a factor in billing]</i>	
"The solicitor should make it clear at the outset if an estimate, quotation or other indication of cost is not intended to be fixed"	
"The solicitor should explain to the client how the firm's fees are calculated ... if the basis of charging is an hourly charging rate, that must be made clear"	"You must: a) advise the client of the basis and terms of your charges; b) advise the client if charging rates are to be increased..."

<p>“The solicitor should explain what reasonably foreseeable payments a client may have to make either to the solicitor or to a third party and when those payments are likely to be needed”</p>	<p>You must ... advise the client of likely payments which you and your client may need to make to others”</p>
<p>“The solicitor should explain to the client the arrangements for updating the costs information ...”</p>	
<p><b>Eligibility for Public Funding</b></p>	
<p>“The solicitor should discuss with the client ... whether the client may be eligible and should apply for legal aid ...”</p> <p>“The solicitor should discuss with the client ... whether the client's liability for their own costs may be covered by insurance”</p> <p>“The solicitor should discuss with the client how and when any costs are to be met”</p>	<p>“You must ... discuss with the client ... whether the client may be eligible and should apply for public funding”</p> <p>“You must ... discuss with the client ... whether the client's own costs are covered by insurance”</p> <p>“You must ... discuss with the client how the client will pay”</p>
<p><b>Insurance or Third Party Cover</b></p>	
<p>“The solicitor should discuss with the client ... whether the client's liability for another party's costs may be covered by pre-purchased insurance and, if not, whether it would be advisable for ... costs to be covered by after the event insurance ...[or] may be paid by another person eg. an employer or trade union.</p>	<p>“You must ... discuss with the client ... whether the client's own costs are covered by insurance or may be paid by someone else such as employer or trade union”</p> <p>“You must ... discuss with the client whether their liability for another party's costs may be covered by existing insurance or whether specially purchased insurance may be obtained”</p>
<p><b>Cost/benefit</b></p>	
<p>“The solicitor should discuss with the client whether the likely outcome in a matter will justify the expense or risk involved”</p>	<p>You must discuss with your client whether the potential outcomes of any legal case will justify the expense or risk involved including, if relevant, the risk of having to pay an opponent's costs”</p>
<p>“The solicitor should discuss with the client ... the risk of having to bear an opponent's costs”</p>	<p>“You must ... advise the client of their potential liability for any other party's costs”</p>
<p><b>Publicly-funded clients</b></p>	
<p>“The solicitor should explain to a legally aided client the client's potential liability for the client's own expenses and those of any other party”</p>	<p>“Where you are acting for a publicly funded client ... you must explain the following at the outset:</p> <ul style="list-style-type: none"> <li>a) the circumstances in which they may be liable for your costs;</li> <li>b) the effect of the statutory charge;</li> <li>c) the client's duty to pay any ... contribution ...</li> <li>d) that even if your client is successful, the other party may not be ordered to pay costs ...</li> </ul>



CFA clients	
<p>“When a client is represented under a CFA, the solicitor should explain:</p> <ul style="list-style-type: none"> <li>i) the circumstances in which the client may be liable for their own costs and for the other party's costs;</li> <li>ii) the client's right to assessment of costs;</li> <li>iii) any interest the solicitor may have in recommending a particular policy or other funding”</li> </ul>	<p>“Where you are acting for the client under a CFA ... you must explain the following, both at the outset and, when appropriate, as the matter progresses:</p> <ul style="list-style-type: none"> <li>a) the circumstances in which your client may be liable for your costs and whether you will seek payment of these from the client, if entitled to do so;</li> <li>b) if you intend to seek payment of any or all of your costs from your client, you must advise your client of their right to an assessment of those costs; and</li> <li>c) where applicable, the fact that you are obliged under a fee sharing agreement to pay a charity any fees which you receive by way of costs from the client's opponent or other third party.</li> </ul>
Updating information	
<p>“The solicitor should keep the client properly informed about costs as a matter progresses. In particular, the solicitor should:</p> <ul style="list-style-type: none"> <li>a) tell the client, unless otherwise agreed, how much the costs are at regular intervals (at least every six months) ...</li> <li>b) explain to the client (and confirm in writing) any changed circumstances ...</li> <li>c) inform the client in writing as soon as it appears that a costs estimate ... may or will be exceeded”</li> </ul>	<p>“You must give your client the best information possible about the likely overall cost ... as the matter progresses”</p>
	<p>If you can demonstrate that it was inappropriate in the circumstances to meet some or all of the requirements in 2.03 (1) [best information possible] and (5) [clear and confirmed in writing] above, you will not breach 2.03</p>

As you can see, the differences between the old and new code are often subtle. Only when the wording comes to be tested by a higher court will we know how significant the changes are (you may recall the debate in **Garbutt v Edwards** [2005] EWCA Civ 1206 about whether the word “shall” in the old Code was mandatory or directory).

Note the number of times “shoulds” have become “musts”. Also note the important “get-out clause” which allows solicitors to exercise some discretion about whether all the provisions of Rule 2.03 need to be adhered to, for example, in relation to a sophisticated commercial client giving repeat business.

Some of the provisions in the old Code have not been transferred specifically, but are clearly inherent in the overall intention of the new Code, for example the prohibition on “inaccurate or misleading” information. Clearly, any such information would not be the “best information possible”.

The changes between the old and new Codes are, for the most part, to be welcomed. Although the new Code is more exhortatory than the old, it is also more succinct and gives solicitors more room to use their discretion. So, as Douglas Adams' book would reassure, “Don't Panic”!

**Victoria Hopkins** is a Costs Lawyer and a remuneration certificate assessor for the Legal Complaints Service.



Watch this Space

## Civil and family Legal Aid Reforms

The Legal Aid Reforms came into effect on 1st October 2007 for civil and family matters, although the implementation of the criminal reforms has been put back until January 2008.

For **Family - Private Law** [i.e. cases involving individuals], there are two levels of fees. Initially it was envisaged that there would be four levels, but levels 3 and 4 are not being introduced until there has been further consultation. It is worth noting that Public Funding Certificates issued on or after 1st October 2007 will refer to Family Help (Higher). However, for the time being, for these cases hourly rates will still apply.

Level 1 fees cover the initial meeting with the client and any work immediately flowing from that meeting.

Level 2 fees are payable where there is a significant family dispute relating to children and/or finance that requires work beyond the initial interview and follow up.

**Family - Public Law** includes cases which fall within the Funding Code definitions of both Special Children Act Proceedings and Other Public Law Children cases (see paragraph 2.2 of the Funding Code).

Costs Recovery News is published by

Deborah Burke Costing Limited

Equity House, 47 Burton Street, Melton Mowbray  
Leicestershire LE13 1AF

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Back issues: If you would like to receive back issues, please contact us.

There are 3 Levels of fees, with advocacy being excluded at level 3. Advocacy is defined at paragraph 10.41 of the Unified Contract Civil Specification.

Level 1 covers initial advice only, including advice before and after a Child Protection Conference, but does not include attendance at the same, unless the circumstances are exceptional.

Level 2 covers advice and support for parents or those with parental responsibility where a Local Authority has issued notice of its intention to issue proceedings.

Level 3 covers all work from the issue of proceedings to the final hearing and any work that follows on from the final hearing.

There are exceptions [so called "escapes"] from most levels in both Private and Public Law cases. Usually these are based on fees of three times the

appropriate fixed fee for that Level, although for level 3 Public Law Cases, the "escape" is only twice the fixed fee.

Whilst the majority of level 1 and 2 work is calculated at Legal Help Rates, note that level 2 in respect of Public Law Cases is to be calculated at Controlled Legal Representation rates.

The Legal Aid Reforms introduce a completely different way of considering costs, and it is important that time recording systems are set with "triggers" which warn fee earners when a case is approaching the fixed fee limit.

The LSC web site has a number of documents to help providers to understand the reforms. Go to the LSC web site, then click on the main heading *Community Legal Service*, and then on the menu on the left hand side of the page go to *CLS News and Updates* and *Pay Rates and Schemes*.



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The Association of Law Costs Draftsmen

Equity House  
47 Burton Street  
Melton Mowbray  
Leicestershire  
LE13 1AF

Telephone:  
01664 482866  
Fax:  
01664 482867

DX 26776  
Melton Mowbray

E-Mail:  
enquiries@dbcosting.co.uk