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# news

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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

So, here we are again. When I wrote my editorial for the summer issue of **Costs Recovery News**, I wished our readers a summer which was "cloud free". The weather certainly didn't live up to anyone's hopes and the turbulent autumn in the financial markets is evidence of deeply unsettled times ahead. Of course with every threat comes an opportunity and in the current climate, there will undoubtedly be winners as well as losers. So, what does it take to be a winner?

Being good at your job and meeting or exceeding your client's expectations is a given. Being able to differentiate yourself from the competition is crucial and clients will always want the answers to the two big questions - How much? And how soon?

"How much?" is a question which your training and experience allows you to answer. "How soon?" is often more difficult to judge because the settlement of the case will depend on so many different factors. Once the case is finished, the client will often continue to ask "How soon?" until the costs have been dealt with and you and your firm will want to know "How soon" your work in progress will be crystallised into billing and payment. With this in mind, the team at

**Deborah Burke Costing Ltd** is delighted to announce its "**Fast or Free**" subscription service for civil bills. It is proving to be a big success for our existing clients and at the moment we still have capacity for new clients to subscribe to the service, but that won't last forever, so if you would like the absolute certainty of your bill of costs being prepared within 10 working days or the bill of costs being returned to you **FREE OF CHARGE**, act now and send your first file into us today.

As always, we are delighted to have the opportunity to talk to our existing and new clients and, as exhibitors at Law 2008 at the NEC, Birmingham on Wednesday 15th and Thursday 16th October 2008, our

costing team is particularly looking forward to being able to chat to you face to face. We're at Stand 10, so come and see us.

Ours is a business which continually strives to innovate and in this issue of **Costs Recovery News**, we have the first of a new regular feature "**Desert Island Cases**". There are some cases which are frequently bandied about by both costs practitioners and lawyers but which are not "household names" to junior fee earners, nor to those who deal with costs issues only on an occasional basis. We shall provide the reference for the case and the briefest of summaries.

As ever, if there are items or regular features which you would like to see, please give me a call.



## Recent Cases...

### The perils of non-compliance with pre-action protocols

In a dispute between the two parties concerning the purchase of properties "off plan", the Claimant was awarded damages of £11,688.25 and interest of £2,021.76. Prior to the proceedings, the Defendant had made a Part 36 offer and once proceedings had been issued, a payment into Court of £9,000.00 was made. However, despite beating the Defendant's payment into court, the judge only awarded costs to the Claimant up to a date some months prior to the issue of the proceedings, with no costs thereafter. The Claimant appealed and the key issue for the Court of Appeal was whether the judge had misdirected himself.

The Court of Appeal found that the Claimant had failed to engage with the pre-action protocol and that it was necessary for the Court to express its disapproval of such a failure to comply.

However, the trial judge had been wrong to reduce the costs award for the period after the Part 36 offer had been made, to nil. The Claimant was awarded 60% of his costs from the date of the Part 36 offer, with the original order standing for the period up to the date of the offer.

Ref: *Straker v Tudor Rose (A firm)* (2007)

[2007] EWCA Civ 368



## Recent Cases...

# Home or away?

This case deals with the perennial problem of whether it is reasonable for a client to instruct solicitors outside the client's local area (1).

The Claimant's case was that in April 1998 he had been unlawfully searched and detained by the police and was subsequently maliciously prosecuted for affray, assault and criminal damage. The Claimant successfully resisted the criminal charges and brought an action against the police, alleging that as a result of his wrongful arrest he developed paranoid schizophrenia.

The Claimant had been represented in the criminal proceedings by a Sheffield firm of solicitors who were local to him, but prior to the conclusion of those proceedings, the Claimant's partner had approached a London firm and spoken to a fee earner there about a possible claim against the police. The Claimant subsequently instructed the London firm to represent him in his case against the police.

The Claimant maintained that his previous solicitors were not specialists in litigation against the police and he argued that it was vital that he receive "appropriate specialist counsel to maximise the potential for success of [his] case".

The claim form was issued in London but management of the case was transferred to Sheffield District Registry. The Claimant initially sought damages of £1,000,000 but eventually settled for £300,000. When the Claimant's costs of the action against the police were assessed, the costs were allowed at approximately £145,000.00, some £50,000.00 less that the costs claimed by the Claimant's London solicitors.

The Deputy Costs Judge had considered the seven points raised by the Court of

Appeal in the case of Wraith v Sheffield Forgemasters Ltd (2), and had concluded that the "vast majority of this claim was in relation to a personal injury claim" and that therefore it was not necessary for the solicitor to have the threefold specialism of expertise in bringing claims against the police, establishing claims for psychiatric injury and understanding the significance of racist action in the causation of psychiatric harm.

The Deputy Costs Judge's conclusion that a reasonable litigant could have instructed a solicitor in Sheffield rather than in London was appealed.

The Court of Appeal concluded that the matter was complex and that it was reasonable to instruct a solicitor with

experience of bringing claims against the police, but agreed with the Defendant that the greater part of the claim was a personal injury claim, and that a firm such as Irwin Mitchell which had offices in Sheffield in 1999 was likely to have experience of bringing actions against the police. It was further held that a reasonable litigant would be expected to realise that the fees likely to be charged by London solicitors would be in excess of those charged by a firm in Sheffield and would conclude that it was not reasonable and proportionate to instruct London solicitors.

The appeal was dismissed.

(1)Ref: *A v Chief Constable of South Yorkshire* (2008)

[2008] EWHC 1658 (Comm)

(2)Ref: [1998] 1 WLR 132

## What about the disbursements?

The Claimant instructed the Defendant solicitors, by way of a conditional fee agreement, to act for her in a personal injury action. The personal injury action was continued, but the Claimant changed solicitors. Invoices delivered to the Claimant by Weightmans came before Master O'Hare, Costs Judge, for detailed assessment. The bills totalled £45,385.08 including a sum not exceeding £11,000.00 for disbursements.

By the time of the detailed assessment hearing, the Defendant had confirmed that it no longer wished to pursue any claim for outstanding profit costs and had agreed to refund any profit costs already paid under the bills. The Defendant's concession had been made on the basis that the CFA retainer between the parties was unenforceable because of non-compliance with the then applicable CFA regulations.

Within the detailed assessment, the issue arose of whether the client could obtain a refund for payments made to her solicitors under an unenforceable CFA.

Master O'Hare found that the Claimant was not entitled to a refund of disbursements paid and referred to the judgment in Hollins v Russell where the Court of Appeal had given guidance that "paid disbursements properly incurred in the conduct of litigation are recoverable from a paying party insofar as they are reasonable and proportionate, even where the CFA under which they were payable by the client is unenforceable" [paragraph 19].

Ref: *Mrs Belinda Tandara and Weightmans Solicitors*

[2008] EWHC 90101 (Costs)

*Hollins v Russell* (Court of Appeal)



## Recent Cases...

# How much can I charge?

Two recent cases have dealt with the ever thorny issue of solicitors' charging rates.

The first was a mesothelioma case (1). Mr Holliday had instructed Irwin Mitchell in May 2001 and had entered into a conditional fee agreement in June 2002 in relation to a claim against the Defendant for damages for personal injury. Mr Holliday died in July 2002 and the Claimant, Mr Holliday's widow, entered into a further conditional fee agreement with Irwin Mitchell in November 2002.

Shortly before the hearing and following negotiations, it was agreed that the Defendant would pay the Claimant the net sum of £250,000.00 (plus an interim payment of £40,000.00 made in November 2005) together with reasonable costs. The costs could not be agreed and a bill was lodged for assessment.

The main issues related to the hourly rates claimed by the Claimant's solicitors and the level of the success fees for both the solicitors and counsel.

Irwin Mitchell had claimed different hourly rates for different periods, but Principal Costs Officer Lambert allowed composite rates for the whole period covered by the bill. The rates per hour claimed were not allowed, but Mr Lambert considered that he should allow rates that were higher than the figures suggested in the SCCO "Guide to the Summary Assessment of Costs".

Mr Lambert allowed the 67% success fee as claimed.

The Defendant appealed against both decisions and the matter came before Master Gordon-Saker.

He was referred to CPR 44.5(3) by both parties and considered that the factors particularly relevant to this case were; the value of the claim; the importance of the matter to the parties; the skill, effort, specialised knowledge and responsibility involved and the place in which the work was done.

With regard to the Guideline Rates, Master Gordon-Saker did not find them to be of any real assistance in this case. "They are designed to assist judges on the summary assessment of costs, which generally will take place following a fast track trial in the County Court or a hearing lasting for less than day. **They are not designed for detailed assessment. Further, they are of course, only guidelines and are stated to be "broad approximations only"** (our emphasis). [Paragraph 26].

The rates allowed by Mr Lambert were confirmed for the partner and paralegal, but the rate allowed for the senior paralegal was reduced.

Turning to the level of the success fee, the Master found that at the time that the cfa was entered into a reasonable assessment of the prospects of success was about 75% and not 60% as claimed by the solicitors. In the circumstances the success fee was reduced to 33.3%, with counsel's success fee being reduced to 27.5% for similar reasons.

The second case considered whether there was a cap on the hourly rates recovered by the solicitors and the level of the rates themselves.

In this case (2), the original retainer was

established by a letter dated 10th May 2000 sent by Denton Wilde Sapte, the receiving parties' solicitors. In that letter it was stated that the charge out rate for the partner was £350.00 per hour and £150.00 per hour for the assistant. The paying parties argued that the wording of the letter of 10th May 2000 restricted the receiving party to these rates.

Master Rogers, Costs Judge, accepted the submission from the paying party that "at the heart this is a contractual point and that the starting point of a contract clearly must be the retainer letter" [Paragraph 93]. The letter of 10th May 2000 clearly indicated the hourly rates and there were "no reservations, as there should have been, to raise rates on an annual, monthly or any other periodic basis" [Paragraph 94]. In the circumstances the Master found that the receiving parties were bound by way of a cap to the rates of £350.00 and £150.00 per hour.

Turning to the level of the rates themselves, the Master rejected the rates put forward by the paying party as far too low and indicated that were it not for the decision on the "cap" that he would have allowed higher rates for some periods. However, because of his decision on the "cap" issue, the rates remained at £350.00 per hour for all work done by partners in the matter and £150.00 per hour for all work done by other fee earners.

*Ref: (1) Cynthia Holliday (Personal Representative of the estate of Michael John Holliday deceased) and E C Realisations Limited [2008] EWHC 90103 (Costs)*

*Ref: (2) Dranex Anstalt and Others and (1) Zamir Hayek and Others and Samuel Hayek [2008] EWHC 90107 (Costs)*



## Recent Cases...

# To terminate or not to terminate, that is the question . . .

The solicitors acted for the client in two matters, the first a statutory appeal against a planning application and the second in connection with the protection of verges outside the client's home.

At the outset of the hearing in respect of the statutory appeal, the solicitors applied for and were granted leave to come off the record and the client was obliged to represent himself. The solicitors indicated that they could not act for the client as they were being instructed to advance an improper case.

The solicitors presented a bill for their profit costs and unpaid disbursements,

which was assessed by Master O'Hare. Master O'Hare disallowed the profit costs in their entirety, on the basis that the solicitors had been wrong to terminate their instructions as they did.

The Court of Appeal found that the client had had unrealistic expectations as to the basis of the planning appeal, and did not accept the advice of the first counsel instructed that there was no reasonable prospect of success.

Proceedings were issued and alternative counsel instructed. The second counsel prepared a skeleton argument which the

client did not accept and he then prepared his own skeleton argument.

Whilst the Court of Appeal expressed sympathy for the solicitors, it indicated that "if [a] client wishes to pursue a case which the solicitor honestly believes he is going to lose, the client is entitled to instruct [them] to do so, absent of any impropriety or misleading of the court" [para 23]

In the circumstances the Costs Judge's decision was found not to be wrong, and the appeal was dismissed.

*Ref: Richard Buxton (Solicitors) v Huw Llewelyn Paul Mills-Owen (2008) [2008] EWHC 1831 (QB)*



## Cases in Brief...

# Know when you have won!

An injunction restraining the transfer of land owned by the Third Defendant (a football club) under a "gentleman's agreement" had been compromised and a Tomlin Order was made. However, no agreement as to costs could be reached.

The Claimants maintained that they had been forced to bring the litigation to prevent a sale of the land at a reduced price.

The Third Defendant argued that there was correspondence which had shown that the proposed transfer of land would not proceed, but that the Claimants had begun proceedings in any event.

The court found that the Claimants had

been entitled to bring the proceedings. However, following an exchange of correspondence in which the Defendants had acknowledged that any sale of the land would have to be at the best price, the matter should have resolved itself quickly. What had prolonged the matter was an attempt by the Claimants to prevent any sale at all.

It was therefore directed that the Claimants should have their costs until the date of the exchange of the relevant correspondence and the Defendant should have its costs from that date to the date of the Tomlin Order.

*Ref: Carlisle & Cumbria United Independent Supporters' Society Ltd v (1) CUFC Holdings Ltd (2) Norman Frederick Story (3) Carlisle United Association Football Club (1921) Ltd (2008) [2008] EWHC 1783 (Ch)*

# Who pays for the amendment?

The Claimant made a successful application to amend the particulars of claim in the substantive action and an order for costs was made in the Defendant's favour. Both the decision to allow the amendment and the costs order were appealed.

The Court of Appeal found that because the issue which caused the need for the amendment of the particulars of claim arose out of the defence, it was correct to allow the particulars of claim to be amended and that there was no basis to interfere with the costs decision - it was normal for the applicant to pay the costs of an application to amend.

*Ref: Davies & Ors v Jones & Anor : Lidl UK GMBH & Anor v Davies and Ors (2008)*



## Cases in Brief...

### Comply or suffer the consequences!

In a case arising out of a software contract, the Claimant sought an order for disclosure and the Defendant had been directed to serve a witness statement stating whether the documents requested existed and, if so, in what form and whether they were available for inspection, etc. The Claimant maintained that the document produced by the Defendant did not comply with the terms of the disclosure order. The court agreed and considered it an appropriate case for an “unless order” to be made.

Ref: *E Group Limited v Bay Baker (2008)*  
[2008] EWHC 1994 (TCC)



## Desert Island Cases...

### Brush and Another v Bower Cotton & Bower (a Firm) and other applications

One of the most frequently quoted cases in costs, and usually misquoted. This case, all about gravel pits, covers, amongst other things, the allowance of unrecorded time and the allowance of time for the preparation of attendance notes. It should be read by all costs draftsmen and litigators at least once a year!

Ref: [1993] 4 All ER 741 QBD

Costs Recovery News is published by

Deborah Burke Costing Limited

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

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## Useful Information...

### Fixed recoverable costs regime challenged again

As mentioned in the summer edition of **Costs Recovery News**, in this low value RTA case which settled before proceedings were issued, the Defendant argued that the language of CPR Rule 45.11 allowed the court to disallow the success fee, if a decision to allow it would allow the recovery of “costs unreasonably incurred”.

The Claimant had the benefit of BTE insurance, but entered into a conditional fee agreement. The claim was compromised by the Defendant agreeing to pay the Claimant £3,068.84 damages and the Claimant's costs.

Costs were agreed in the sum of £1,718.18, except for two items, firstly the success fee of £177.47 claimed under CPR 45.11 at 12.5% and secondly the amount claimed for a medical report. On detailed assessment, the District Judge reduced the amount claimed for the medical report from £352.50 to £250.00, but held that there was no discretion to allow or disallow the 12.5% success fee nor to alter the level of same. The Defendant appealed the decision in relation to the success fee.

The issue at the heart of the appeal was “essentially one of construction” of the word “**may**” in CPR Rule 45.11(1). The Defendant argued that the use of the word “may” meant that the court had a discretion whether or not to award the success fee.

The Court of Appeal held that there was no discretion to disallow a success fee under CPR Part 45 and gave the opinion that the “natural meaning ... is that in such a case the Claimant is entitled to recover a success fee. Just as the expression “the Claimant may recover damages” means that he has a right to recover damages, so, as I see it, does the expression “the claimant may recover a success fee” mean that he has a right to recover the success fee” [paragraph 19].

The appeal was accordingly dismissed and the Court of Appeal's decision is an undoubted piece of good news for claimant litigators, particularly those operating largely within the predictable costs regime.

Ref: *Janie Kilby v Donald Gawith*  
[2008] EWCA Civ 812



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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

