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Debbie Burke ~ Editor

TO all our readers, a Happy New Year. As the snow fell on our return to work, so did the fall out from the Court of Appeal judgment in the Accident Line Protect test cases. I am not the only one predicting that this issue has not, regrettably, been disposed of once and for all.

I am also predicting that amongst the plethora of costs reviews currently being undertaken, there will be much to listen to about costs budgeting. The Sibley case is another good example of judicial frustration being vented at parties to litigation who, even now, appear to have scant regard for the costs being incurred in the litigation in which they are involved.

The just approved 2009 guideline hourly rates are reproduced in this issue of **Costs Recovery News**. Most costs commentators seem to have concentrated on the amalgamation of Bands 2 and 3 and the importance of hourly rates being reviewed to reflect the new guidelines. I was struck, however, by something quite different.

The new table of guideline rates was accompanied by a separate document entitled "The Derivation of New Guideline Rates" (this appears at www.judiciary.gov.uk/docs/pub_media/guideline-hrly-rate.pdf) and makes extremely interesting reading.

The evidence submitted by the ABI to the costs committee suggested a large gap between the rates charged by Claimant solicitors and those charged by their Defendant counterparts - as much as 35%. The ABI attacked the claims management industry as serving "no socially useful purpose" and the ABI argued that the existence of guideline hourly rates which are "significantly higher" than market rates allows Claimant firms to pay referral fees. The ABI's reasoning is that by reducing the guideline hourly rates to the level paid to Defendant solicitors, it will be possible to eliminate "anti-competitive behaviour". The topic of referral fees is simply not going to go away and this links back in, of

course, to the ALP judgment and the use of claims farming/referral schemes.

So, a very interesting start to the year. The team at Deborah Burke Costing Ltd looks forward to continuing to work with all of you during this coming year and providing our top class bill drafting, negotiating and costs consultancy service.

Finally, please note that we will be changing the database we use to distribute **Costs Recovery News**, so to guarantee that you continue to receive future issues, please ensure that you subscribe via our website www.dbcosting.co.uk.



Cases in Brief...

He who instructs the piper - pays the piper!

THIS appeal relates to a decision by Costs Officer Martin on detailed assessment to allow the costs of a firm of loss adjusters.

The Appellant had discontinued a claim for personal injuries. The Defendants' Bill of Costs contained a claim for two invoices for work done by a firm of loss adjusters. One invoice was dated July 2005, before Solicitors had been instructed on behalf of the Defendants and before the issue of proceedings, and the second invoice was dated July 2006. The loss adjusters had been instructed by the Defendants' insurance company and both invoices were addressed to the Defendants' insurer.

Master Haworth found that the Defendants had not assigned the cause of action to the insurers and that "there is no basis on the facts of this case for saying that [there was] any direct liability, either through insurers or directly to [the loss adjuster] for their fees" and it therefore followed that inter partes recovery of the loss adjuster's fees would be a breach of the indemnity principle.

The appeal was allowed and the loss adjusters' fees were disallowed in their entirety.

Susan Elizabeth Cuthbert-v-Stephen Ronald Gair and Wendy Isabell Gair (T/A The Bowes Manor Equestrian Centre)
[2008] EWHC 90114 (Costs)



Recent Cases...

Disclosure of a “new style” CFA

MASTER Campbell had to decide whether the Defendants were entitled to disclosure of a CFA between Mr Findley and his solicitors, notwithstanding the fact that the CFA had been entered into after

1st November 2005. Master Campbell also had the task of deciding whether an opinion of counsel referred to in a risk assessment (which had been disclosed) should also be disclosed.

The Defendants maintained that the request for disclosure of the CFA was not a “fishing expedition” bearing in mind that a sum of over £300,000.00 turned on the level of the success fee claimed, and that all that had been asked for was sufficient documentation to ascertain how the success fee had been calculated. In addition the Defendants advanced the argument that because the risk assessment had, in fact, been disclosed “Mr Findley had waived privilege in the CFA and the counsel's opinion upon which the success fee had been premised” [para 29].

Master Campbell decided that the argument concerning the waiving of privilege failed. This was on the basis that the risk assessment that had been disclosed was a document prepared by Mr Findley's Solicitors for use by that firm's CFA committee. It was not the CFA itself.

With regard to the opinion of counsel referred to in the risk assessment, again Master Campbell considered that there was no obligation to disclose a statement of reasons for the success fee in the way that there would have been in the case of a CFA signed before the revocation of the 2000 CFA Regulations.

However, Master Campbell did comment that had the CFA been handed over in the first place (as recommended by the Court of Appeal in Hollins v Russell) “it would have been unnecessary for the parties to have engaged in this round of satellite litigation” [para 49].

Lewis Charles Findley and (1) Cantor Index Limited (2) Cantor Index Holdings LP (3) BGC International (formerly Cantor Fitzgerald International)
[2008] EWHC 90116 (Costs)



Cases in Brief...

And the verdict is...

DECEMBER 2008 saw the Court of Appeal handing down judgment in what has become known as the Accident Line test cases. Judgment was delivered by Sir Anthony Clarke, Master of the Rolls.

No-one can really have been surprised that the Accident Line Protect (“ALP”) scheme has received judicial approval. The challenges of the various Defendants who had argued that the benefits to member firms constituted a declarable interest pursuant to the now revoked CFA Regulations 2000 were rejected.

In essence, the judgment seeks to distinguish between “acceptable” and “unacceptable” schemes. The Court of Appeal clearly endorses the ALP scheme as acceptable - the principal purpose of the scheme is the provision of ATE insurance and this distinguishes it from the “claims farming” (for this read “unacceptable”), types of schemes. The Ashley Ainsworth scheme which was considered in the Myatt and Garrett cases is clearly an example of an “unacceptable” type of scheme.

So far, no surprises. However, so often it is not the judgment itself but the obiter remarks that are the lasting legacy of a costs case which is supposed to bring an end to a particular branch of costs satellite litigation.

This is exactly what has happened here and it is these obiter comments which will, no doubt, give food for thought to paying parties and their advisers.

The courts will no doubt be asked to consider other schemes to assess whether such schemes are “acceptable” or “unacceptable”? How will this decision be made? Will the essential purpose of the scheme be determinative or will it depend on the amount of work which a firm receives from a particular scheme?

Despite the hope expressed by the Court of Appeal (yet again), that this particular satellite litigation will now be at an end, the clever money is sure to be on a new challenge to a different kind of scheme being brought in the near future by paying parties. Bets are now being taken as to which scheme will be the first to be challenged.

Ref: Tankard-v-John Fredericks Plastics Limited [2008] EWCA Civ 1375



Useful Information...

SCCO 2009 Guideline Rates for summary assessment

	Band A	Band B	Band C	Band D
London 1	402	291	222	136
London 2	312	238	193	124
London 3	225 - 263	169 - 225	162	119
National 1	213	189	158	116
National 2/3	198	174	144	109

The rates for London 3, Bands A and B are presented as ranges following the format of the Guide to The Assessment of Costs. These ranges go some way towards reflecting the wide range of work types transacted in these areas.

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Recent Cases...

No error in law, no interference

WHEN a deputy master was justified in his conclusions and had not made any error of law, the High Court found that it would be inappropriate to interfere with his decisions.

In this matter, which arose out of a dispute over share dealing accounts, Deputy Master Hoffman had substantially reduced the fees claimed by Counsel for Sibley & Co. This decision formed the sole basis for the appeal.

The QC's fees of £151,070.00 had been reduced to £64,835.00 on assessment, while the fees for Junior Counsel were reduced from £77,230.00 to £31,625.00.

Peter Smith J. referred to CPR 52.11(3)(a) which states that the court will only allow an appeal when a decision was "wrong". Having reviewed the judgment of Deputy Master Hoffman and documentation referred to in the judgment, it was considered that the conclusion reached was justified and the appeal was dismissed.

Peter Smith J. had some comments to make as to the level of Counsel's fees - "what is stark is that the Appellant [Sibley & Co.] made no attempt to discuss let alone fix the level of fees counsel were incurring ... and there was no discussion between the Appellant and Respondents as to any level of fees." [para 20]. He also noted that whilst the QC "provided a note for some aspects of the costs he never provided a detailed statement of the time he spent on any case" [para. 9].

Sibley & Co.-v-(1) Reachbyte Ltd (2) Kris Motor Spares Ltd. (2008)

[2008] EWHC 2665 (Ch)

No relief from sanction

THIS case concerned an application for relief from sanction arising out of a failure by the Claimant to notify the Defendant of the existence of an ATE policy.

The case involved a clinical negligence claim. The Claimant instructed solicitors. Protective proceedings were issued and the claim was served on the Defendant in August 2006. In November 2006, the Claimant entered into a CFA and a notice of funding was appropriately served. Particulars of claim were served on the Defendant in March 2007 (together with a further notice of funding). In April 2007, the Claimant took out an insurance policy with Law Assist but no notice of the ATE policy was given. The litigation continued and shortly after the service of witness statements in November 2007, settlement was agreed. The final order was made in December 2007.

The Claimant served a breakdown of costs and the parties negotiated (and almost agreed) the claim for costs. Against a claim for more than £220,000.00, the parties were only £5,000.00 apart when in June 2008, the Claimant notified the Defendant that due to an "oversight", the amount of the ATE premium had been "omitted" from the Claimant's costs breakdown. The amount of the premium which had been "forgotten" was more than £80,000.00! The Claimant made an application for relief from sanction in July 2008 and the application was heard by Master Campbell in November 2008.

Pursuant to CPR 44.15 and paragraph 19.2 of the Costs Practice Direction, the Claimant should have provided the required information about the insurance policy within seven days of the insurance policy being taken out. In this case, the gap between taking out the policy and giving notification was more than fourteen months.

Master Campbell's carefully set out judgment reviews the relevant law in relation to giving notification, the detailed requirements for applying for relief from sanction pursuant to Rule 3.9 of the Civil Procedure Rules and the judgment in the case of Supperstone-v-Hurst⁽¹⁾.

The Claimant's primary submission accepted that the conducting fee earner had made an error (but that this was not a deliberate or wilful failure to comply with the rules) because she was not aware of the need to serve notice on the Defendant when the insurance policy was taken out.

The Defendant relied on the fact that it had had no notice whatsoever of the ATE insurance premium until long after the litigation had been concluded. Unlike the Supperstone⁽¹⁾ case where the paying party knew about the ATE policy but the notice given was technically deficient. In addition, the mistake had been rectified only after the substantive litigation had been resolved. Counsel for the Defendant argued that if relief from sanctions was given in this case, it would be difficult to conceive of any circumstances where relief would be refused.

Master Campbell's conclusion was that a legal error had been made by an experienced solicitor whose firm was unaware of rudimentary CPR principles. There was no "good explanation" for the failure to notify the Defendant of the existence of the ATE policy (Rule 3.9 (1) (d) and the proper administration of justice (Rule 3.9 (1) (a)) required the application for relief from sanction to be dismissed. Costs of the application were awarded to the Defendant.

Mrs Mehtap Kutsi (Widow and Administratrix of the Estate of Engin Kutsi)-v-North Middlesex University Hospital NHS Trust [2008] EWHC 90119 (Costs)

Ref: 1. Supperstone-v-Hurst (2008) EWHC 735 (CG)



Recent Cases...

Think before you counterclaim!

THE costs of a relatively simple claim and counterclaim were, in the words of Lord Justice Goldring “deeply troubling. ...It makes no sense at all for over £100,000.00 and 9 days ... to be spent on what was a perfectly straightforward piece of litigation about a few thousand pounds”.

Although the main claim and counterclaim were small, a further counterclaim was made for loss of profits in the region of £30,000.00 to £40,000.00 [the Thales counterclaim]. This counterclaim was, in the view of both Lord Justice Goldring and the trial judge, hopeless.

At the end of the original trial no order for costs had been made and the case had been settled by the payment of £265.00 plus interest by the Claimant to the Defendant.

The Claimant appealed against the costs order made on the grounds that the existence of the Thales counterclaim, which should never have been advanced, meant that the case was allocated to the multi-track rather than the small claims track and that this should have been reflected in the costs order made.

The Court of Appeal agreed with the Claimant. Without the Thales

counterclaim “it would have amounted to a straightforward case involving at most a little over £3,000.00 in which Mr Peakman might have represented himself” [para. 29]. The Court of Appeal directed that Lindbrooke Services should pay 50% of Mr

Peakman's costs from the date of allocation, which would also take into account the fact that the Defendant did succeed, to some extent, on its basic counterclaim.

David Peakman and Lindbrooke Services Limited (2008)
[2008] EWCA Civ 1239



Cases in Brief..

A blow to insurance companies?

WHEN a failed personal injury claim meant that the Defendants (whose defence of the claim had been dealt with by insurers) were able to claim their costs against the losing party, one of the items claimed was an amount paid by the Defendants' insurer to a loss adjuster for preliminary negotiations.

On detailed assessment, the amount claimed was allowed. That decision was appealed.

The losing party argued two things. First, that the investigative work was “solicitor's” work but that it had been undertaken before the Defendants had instructed solicitors. The second argument put forward was that the Defendants were not liable to pay this amount to their solicitors and that the indemnity principle therefore prevented recovery of this amount from the losing party.

On appeal, the first argument succeeded. At the time when the fee was incurred, the Defendants had not

instructed solicitors - they were litigants in person. As the work done was work which a legal representative would normally have done, the amount claimed was caught by the judgment in the Agassi⁽¹⁾ case.

The second argument also succeeded. The claim for costs here was the Defendants, not that of their insurers. At the time when the work was done, solicitors had not been instructed and there could be no question of any “implied retainer” between the Defendants' insurers and the solicitors subsequently instructed. Recovery would have been a breach of the indemnity principle.

Perhaps this judgment will result in the earlier instruction of solicitors so that insurers can seek to recover the cost of preliminary negotiations if they are ultimately successful? You never know

Ref: Cuthbert v Gair [2008] EWHC 90114

Ref: I. Agassi v S. Robinson (HM Inspector of Taxes) [2005]
EWCA Civ 1507

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