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costs recovery

## news

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WEBSITEThe 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

SINCE the last edition of **Costs Recovery News**, Deborah Burke Costing Limited has celebrated its eleventh birthday. During the last eleven years, the team here at Deborah Burke Costing Limited has been listening to its clients, responding to their costing needs and developing the skills, systems and procedures to ensure that you, the client, get the very best results from using our services - recovering the maximum possible if you act for a receiving party, minimising your client's total outlay if you act for a paying party, advising on all aspects of costs negotiations and advising you on solicitor/client disputes together with providing expert knowledge of costs at all stages of the legal process.

Our business values - "having the highest professional standards and integrity, commitment and loyalty, passion, clear communication, continuous improvement and innovation" - are displayed proudly in our offices and the priority of our team is to live up to those values every day.

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If you are serious about providing the best possible service to your clients and making a profit from your work, but have not yet instructed us, you should. Rupert Hawke's excellent article on page 7 highlights the need for regular accurate billing and the effect of poor cash flow on your business's liquidity. We take these

issues every bit as seriously as you do.  
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### Cases in Brief...

## It's a bug's life . . . .

THERE are two reasons to read this case. The first reason is its name. The Claimant is described as "a small invertebrate charity". Whether that is a reference to the small size of the charity or the small size of the invertebrates which the charity seeks to protect is not entirely clear!

The second reason to read the judgment is because it sets out clearly the legal principles, relevant case law and correct procedure to be followed in relation to applications for protective costs orders made both at first instance and in the Court of Appeal.

For those of you not instantly familiar with the concept of protective costs

orders, these can be made where issues are raised in litigation which are of general public importance and where if an order capping the upper limit of costs recoverable by/from an applicant is not made, the applicant will probably (and reasonably) discontinue the proceedings.

It is of interest as well to note that the case also held that if a cap is to be imposed, it is right to include the success fee within the figure of the cap.

*Ref: The Queen on the application of Buglife - The Invertebrate Conservation Trust -v- Thurrock Thames Gateway Development Corporation and Rosemound Developments Ltd [2008] EWCA Civ 1209*



## Cases in Brief...

# Challenges to insurance premiums

THIS was an unusual personal injury case. The Defendant was instructed by the Environment Agency to excavate two lakes. The Claimant lived very close to the lakes and every day around fifty lorries and trucks passed by the end of his garden. The lorries caused dust to rise and sand and ballast escaped from them. The Claimant alleged that the sand and ballast had caused dust to be blown into his house and garden resulting in breathing problems. The claim was agreed without the issue of proceedings on the payment of damages of £1,500.00. The majority of the Claimant's costs were agreed by the Defendant. One substantial item, the after the event insurance premium, and two minor items, remained outstanding. The insurance premium claimed was £2,730.00 including IPT.

The Claimant and the Defendant addressed Master Haworth as to whether it had been reasonable to enter into an ATE policy and secondly, whether the amount of the premium was reasonable.

### The Defendant's arguments were:-

1. There had been an admission of liability but without medical evidence of an injury, there was no claim to pursue (the ATE premium was taken out before medical evidence was received).
2. There was no risk of the Claimant paying the Defendant's costs because there were no proceedings.
3. There was no risk of the Claimant having to pay his solicitors because they were acting on a CFA.
4. The only risk was in paying the medical report fee (the fee was

£910.00) and incurring a premium of £2,730.00 to insure against this, could not be said to be reasonable.

### The Claimant's arguments were:-

1. Causation remained in issue.
2. The Defendant was sufficiently confident about liability not to have made any Part 36 offer until well after the inception of the ATE insurance policy.
3. There were other risks - the Defendant could withdraw the admission, the Defendant could make a Part 36 offer which the Claimant failed to beat at a subsequent trial, there was a risk of an adverse interim costs order and there was a risk of failing to recover a disbursement.

Master Haworth decided that it was reasonable of the Claimant to take out an ATE policy. He referred to Section 11.7 of the Costs Practice Direction which required him to have regard to the facts and circumstances of the case as they reasonably appeared to the Claimant's solicitors **when** (the Judge's emphasis) the insurance was entered into. Master Haworth was absolutely certain that he could not use the benefit of hindsight and that when the Claimant took out the insurance policy, there were a number of risks which it was proper to insure against. These were "real risks, not illusory or fanciful".

It is probable that the Defendant, having lost on the first issue, was hopeful that Master Haworth would look more kindly on the Defendant's arguments in relation to the amount of the insurance premium.

The Defendant looked at various reported judgments and other material and referred to the case of Rogers -v- Merthyr Tydfil<sup>1</sup>. Having referred to paragraphs 39, 40, 64 and 68 of the Rogers judgment, the Defendant suggested that a premium of £680.00 plus IPT was more than reasonable.

The Claimant's solicitor maintained that his objective was to ensure that claimants with CFA's had access to insurance provided by a reputable supplier at a reasonable market rate and that the insurer in this case had made available a product specifically for the Claimant's solicitor's private cases. The Claimant's solicitor maintained that the scheme compared favourably to other schemes and he also referred to the Rogers judgment.

The Claimant succeeded again. Master Haworth said that although at "first blush" the premium claimed appeared disproportionate compared to the damages recovered, Brooke LJ in the Rogers case had correctly concluded that judges did not have the experience to judge the reasonableness of a premium except in very broad brush terms. Master Haworth referred to Brooke LJ's comments that the "very viability of the ATE market will be imperilled" if the Courts were to regard themselves as better qualified than the underwriter to rate the financial risk that an insurer faces.

Ref: *Burgess -v- J Breheny Contracts Limited* [2009] EWHC 90131 (Costs)

Reference:  
1. *Rogers -v- Merthyr Tydfil County Borough Council* [2006] EWCA Civ 1134



## Recent Cases...

# Inquest costs - recoverable or not?

BOTH of these cases came before the High Court on appeal. Both arose out of actions arising from deaths in custody. In the case of Roach, the inquest into Mr Roach's death lasted for fourteen days. In the case of Matthews, the inquest lasted for eight days.

In the Roach case, the inquest verdict in March 2007 was followed by a detailed letter of claim sent in April 2007. There was no substantive response and proceedings were issued in June 2007 by Mr Roach's parents. The case was compromised in September 2007 when a court order was made by consent which provided for agreed damages of £10,000.00 to be paid together with "reasonable costs". The bill of costs subsequently delivered was for approximately £67,000.00 (including additional liabilities) of which some 90%

was attributable to the attendance of counsel and solicitors at the inquest. The case of Matthews followed a similar pattern. After the issue of proceedings, a consent order was made which provided for the payment of £20,000.00 and costs. The bill of costs came to approximately £92,000.00 (including additional liabilities) of which £43,500.00 plus VAT related to inquest costs.

The matters came before the Honourable Mr Justice Davis in the High Court in December 2008.

Within the appeal, all agreed that the coroner's court in each case had not had the power to make an award of costs in relation to the attendance of each Claimant's legal representatives at the inquest. The Court looked carefully at Section 51 of the Supreme Court Act 1981 which

provides that "costs of and incidental to all proceedings ... shall be in the discretion of the court".

The parties accepted that the orders for costs made in the substantive proceedings were to be taken as including "costs of and incidental to" the substantive proceedings.

### The paying parties argued that:-

1. previous, binding case law required the Court to find that the costs in prior proceedings can never be recovered in subsequent proceedings;
2. the inquests had taken place because of the provisions of the Coroner's Act 1988 and would have taken place irrespective of any subsequent civil claim. The costs incurred were, therefore, incidental to the inquests and not the civil claims.

The paying parties specifically referred to the Bowbelle case (where inquest costs had been allowed) but submitted that the decision was "per incuriam" because other relevant cases had not been referred to the Court in that case. Counsel for one of the paying parties submitted that the Bowbelle judgment was simply wrong. However, it was held that there was no "rule" that inquest costs could not be recovered and that these costs should be dealt with on a case by case basis. The correct approach in each case is to look for whether the costs are "incidental" to the civil proceedings.

This judgment does not represent a green light for the recovery of inquest costs when there are subsequent civil proceedings. The judgment makes it clear that there will continue to be careful scrutiny whenever inquest costs are claimed. Practitioners will be well advised to read the judgment before attending an inquest which might turn into a personal injury claim. A carefully thought out rationale for the need to attend an inquest can only assist with the subsequent recovery of costs in principle and any arguments on assessment in relation to proportionality.

Ref: Roach -v- The Home Office and Matthews -v- the Home Office [2009] EWHC 312 (QB)

## If your client doesn't pay, can you make him bankrupt?

CAN a solicitor obtain a bankruptcy order against a client who failed to pay outstanding fees? Just this situation arose in this case when Mr Truex delivered four invoices to his client, Mrs Toll, but she paid only two of them.

Mr Truex had applied to come off the record, then served a statutory demand, commenced bankruptcy proceedings and obtained an order. After the bankruptcy order was made, Mrs Toll changed solicitors and obtained legal aid. She then appealed the bankruptcy order. The appeal came before Mrs Justice Proudman who considered Section 267 of the Bankruptcy Act 1986 and in particular the requirement that the debt in question must be for a liquidated sum. Mrs Justice Proudman concluded that a claim for solicitors' fees which have not yet been assessed or determined is not a claim for a liquidated sum.

The judgment also considered whether any actions other than the assessment process could convert an unassessed solicitor/client invoice into a debt on which a bankruptcy petition could be founded. The judge concluded that if a client bound himself not to resile from an admission, acknowledgement or agreement, then this could, in appropriate circumstances, convert the amount claimed by a solicitor into a liquidated sum.

Mrs Justice Proudman also looked at various other issues which could arise when a solicitor seeks to begin bankruptcy proceedings against a client and the full judgment represents essential reading for any solicitor who finds himself following in Mr Truex's footsteps.

Ref: David Truex -v- Eugenie Romanovna Toll [2009] EWHC 396 (Ch)



## Recent Cases...

# Cuban cigars - Bad for your health?

AS a costs draftsman or lawyer trying to unravel the latest judgment in the long running Mastercigars<sup>1</sup> saga, the answer to the question posed above is a resounding yes .....

Readers of **Costs Recovery News** may well remember previous rounds in the long running dispute between Mastercigars Direct Limited and its former solicitors, Withers LLP. Withers represented Mastercigars in litigation arising out of a trademark dispute concerning the import into the UK of many well known brands of hand rolled cigars. The company and its solicitors fell out in relation to various solicitor/client invoices delivered by Withers to Mastercigars and, in the fullness of time, some of the invoices in question became the subject of a solicitor/client detailed assessment. Within that assessment, an order was made by Master Rogers which bound Withers to an estimate of costs ("the Estimate") given to Mastercigars on 6th May 2005, save for specified additional sums.

Withers appealed that order and the appeal (together with three other appeals) was heard in the Chancery Division by Mr Justice Morgan in October 2007. Mr Justice Morgan allowed the appeal in relation to the detailed assessment proceedings (see *Issue 14 of Costs Recovery News*) and the solicitor/client bills were remitted for a fresh detailed assessment hearing. At the same time, Mr Justice Morgan gave specific directions as to the way in which Mastercigars' argument that it had relied on the Estimate should be dealt with.

The second detailed assessment took place before Master Simons on 23rd and 24th June 2008. During the course of this detailed assessment hearing, Master Simons dealt with the Estimate. Judgment was reserved and handed down on 11th July 2008. Having decided that Mastercigars had relied on the Estimate, Master Simons decided that he should

reflect that reliance by limiting the profit costs for the period covered by the estimate to the amount of the estimate plus a margin of 20%. No order was drawn up to reflect this judgment but Withers were granted permission to appeal this decision and a later order of 14th November 2008 which gave effect to the decision. The matter was listed, for a second time, before Mr Justice Morgan. Mastercigars cross-appealed.

Readers will not be surprised to learn that by the time Mr Justice Morgan came to deliver his second judgment, he was clearly uncomfortable with the "very considerable costs" which had been incurred during the detailed assessment process.

In his very long appeal judgment, Mr Justice Morgan endorses very clearly the approach taken in the case of Leigh -v- Michelin Tyre plc<sup>2</sup> as supported by the judgment in the more recent case of Reynolds -v- Stone Rowe Brewer<sup>3</sup> (*Issue 14 of Costs Recovery News*) in circumstances where the client asks the Court in a solicitor/client assessment to take account of an estimate provided by the solicitor.

Mr Justice Morgan highlighted that Master Simons had held that Mastercigars did rely on the Estimate - the company was concerned about the amount of costs and needed the Estimate for funding purposes. Master Simons had then "grappled" with the question as to how the Estimate had been relied on. Mr Justice Morgan rejected Withers' argument that a client had to show that it had acted to its detriment in relying on an estimate and said that where a client argues reliance, the following legal process should be followed. Mr Justice Morgan emphasised that this is "practical guidance" not a "legal imperative":-

■ The ultimate question is to decide the sum which it is reasonable for the client to pay having regard to the

estimate and any other relevant matter.

■ The Court must determine whether the client relied on the estimate and, if so, how the client relied on the estimate "without conducting an elaborate and detailed investigation" if at all possible.

■ The Court must decide whether the costs claimed should be reduced because of a finding of reliance and, if so, in what way and by how much. Whether there should be a reduction and the extent of any reduction is a matter of judgment. However, adopting a margin approach as per the case of Wong<sup>4</sup> is not endorsed, although it is accepted that if no other method is available, this may be appropriate.

■ The Court must then form an assessment of the impact of the estimate on the conduct of the client. In this way, specific deductions can be made from costs which are otherwise recoverable to reflect the impact of an "erroneous and uncorrected estimate" on the conduct of the client.

■ The Court must consider the deductions which are needed to do justice between the parties. The Court's function is not to "punish" the solicitor for providing a wrong estimate or for failing to keep the estimate up-to-date.

■ It may be appropriate to determine whether and how reliance on an estimate will be reflected in the detailed assessment before carrying out the detailed assessment.

Mr Justice Morgan then looked at the way in which Master Simons had reflected

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Continued on page 5

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## Continued from page 4

reliance on the Estimate within the detailed assessment. Whilst Master Simons was not wrong in law to allow Withers something above their estimate, Mr Justice Morgan concluded that the decision of Master Simons was inadequate as a statement of reasons for selecting a 20% margin, which has “all the appearance of being arbitrary rather than calculated”, not least because Master Simons had not shown clearly which factors he had taken into account (or left out of account) in deciding to apply a 20% margin. In conclusion, Mr Justice Morgan

set aside Master Simons' decision as to the 20% margin.

When the matter had come before Mr Justice Morgan on the first occasion, he sent it back for a fresh detailed assessment before a different costs judge. This time, he decided to adopt a different approach in order to “decide this dispute between the parties about the effect of the estimate”.

Mr Justice Morgan directed that the senior costs judge (who had been sitting with him on the appeal as one of two assessors) should prepare a report to enable the Court to decide the final outcome of the questions which

remained outstanding. Mr Justice Morgan invited the parties to agree the questions to be put to the senior costs judge and to agree on the necessary directions so that on receipt of Master Hurst's report, Mr Justice Morgan will be able to determine the matter finally. In the last paragraph of his judgment, there is also a plea to the parties as to the “desirability of acting proportionately”. The words “stable”, “door”, “horse” and “bolted” come to mind.

### References:

1. *Mastercigars Direct Limited -v- Withers LLP* [2009] EWHC 651 (Ch)
2. *Leigh -v- Michelin Tyre plc* [2004] 1 WLR 846
3. *Reynolds -v- Stone Rowe Brewer* [2008] EWHC 497 (QB)
4. *Wong -v- Vizards* [1997] 2 Costs LR 46

## “What’s the risk” under a CFA when liability has been admitted?

THIS case arose out of an accident in which the Claimant, a passenger, was severely injured in an accident. Liability was admitted almost immediately by the driver's insurers.

The CFA the Claimant entered into with her solicitors utilised the Law Society's standard definition of “success”. It also, as is relatively common, included a provision by which her solicitors gave up the right to any post-offer base costs and success fee if the Claimant was advised to reject an offer which she failed to beat at trial. The CFA provided for a recoverable success fee of 83% which was supported by a complex risk assessment matrix.

The Claimant received damages of £680,000.00 and her base costs were agreed at £92,500.00. Only the success fee remained in issue between the parties.

On detailed assessment, the District Judge appears to have taken particular note of the risk that the Claimant might abandon the litigation but, nevertheless, reduced the success fee to 70%. On appeal, this was reduced further to 50%. Then the matter came before the

Court of Appeal for consideration of the appropriate success fee to allow where liability was not in issue.

The Court of Appeal's starting point was that in the particular circumstances of this case (there was no evidence other than that the driver was responsible), the Claimant was clearly likely to recover substantial damages, so that the risk of losing could be no more than 5%. The Claimant's solicitor had added on a further success fee element of 20% because the value of the claim was high. The Court of Appeal disagreed (although the possibility of an increased number of pitfalls in higher value cases was recognised). The Court of Appeal was similarly unimpressed by an attempt to add a further 20% onto the success fee to reflect “unidentified defendants and insurance issues”.

At this point, the Court of Appeal turned to the Part 36 provision in the CFA. How could the solicitors analyse a number of contingencies separately and then together - the chance of an offer being made, the timing of any offer, the chance of the legal representative advising rejection, the chance of the client accepting the advice and the chance of the offer being beaten.

Nigh on impossible!

The Court concluded that the solicitor should assess risk by looking at the risk of losing part of the legal fees for that kind of reason and express that as a percentage of the total fees likely to be earned at trial. Taking their own evidence, the Court assessed the risk undertaken by the solicitors as equivalent to a 17% risk of total failure and allowed a reduced success fee of 20%.

The Court did not allow any element in relation to the chance that the client would disinstruct her solicitors on the basis that the CFA provided for the solicitors to be paid their base costs if the client terminated the agreement.

This case is likely to be relied on by defendants even where there is no admission of liability but the case on liability is nevertheless strong. Defendants will be looking at persuading the Court in these cases that the total risk of failure is very low. Perhaps defendants will even make the argument that in such circumstances an insurance premium is unnecessary.



## Recent Cases...

# It's all change for retrospective CFA's

THE desirability of a retrospective CFA as a way of circumventing/surmounting difficulties caused by Regulation 4 challenges to pre-November 2005 CFA's is long standing. This is exactly what happened in the case of Birmingham City Council -v- Rose Forde!

In this case, the Claimant had entered into a CFA (without a success fee) with her solicitors in relation to proceedings against her local authority for failure to repair her property. Shortly before the proceedings were settled, the local authority had challenged the validity of similar CFA's in other similar cases. The Claimant's solicitors wrote to the Claimant asking her to enter into a second CFA (which, unlike the first one, contained a success fee). The solicitors explained that the costs up to the date on which the second CFA was entered into would be dealt with under the second CFA UNLESS the second CFA was held to be invalid. If that happened, the solicitors explained that these costs would revert to be dealt with under the first CFA. The express consideration for the second CFA being entered into was that the solicitors would continue to act for the Claimant.

On assessment, the validity of the second CFA was upheld and unsurprisingly, the Defendant appealed:- **as set out opposite.**

So, this judgment is authority for sorting out a problem with a retainer by simply super-imposing a new, shiny, retainer in place of the original troubled retainer. Is that right? How does this decision sit with the increasingly onerous client care provisions? Is it really adequate consideration for entering into a new retainer with your solicitor in circumstances where (potentially at least) you presently have no liability for fees, that the same solicitor will continue to act for you?

The undue influence point failed here because the paying party had not been able to show that the client actually avoided the retainer, rather than the contract being voidable. So, the position might have been different if the client had avoided the contract. What about a client who against all objective persuasive evidence refuses or fails to avoid a contract? Can a party then argue that there has been "objective" undue influence?

This is undoubtedly a significant judgment and one which bears a careful reading and interpretation, particularly if a solicitor is considering "putting right" a possible difficulty with an existing retainer.

Ref: I. Forde -v- Birmingham City Council [2009] EWHC 12 (QB)

Defendant's arguments on appeal	Decision of Mr Justice Clarke
1. The letter accompanying the second CFA did not form part of the retainer.	The letter <u>was</u> part of the retainer - it invited acceptance of the second CFA and contained provisions which the parties clearly intended should be part of their agreement.
2. There was no consideration for the second CFA because the solicitors were already bound to continue acting for the Claimant under the first CFA, which had never been terminated in accordance with its own terms.	The imposition of an enforceable obligation to provide services in place of an obligation which the paying party argued was unenforceable <u>did</u> amount to consideration for a fresh promise to pay fees. In addition, the second CFA extended the scope of work covered by the retainer and this provided a further benefit.
3. The second CFA had to be presumed to have been procured by undue influence and it was manifestly to the Claimant's disadvantage (because of the success fee and the imposition of a retrospective liability) as compared to the first CFA where, if it was found invalid, the Claimant was not liable for any fees under it.	There was no presumption of undue influence. Detailed assessment was available to assess the reasonableness of the success fee imposed by the second agreement and whatever the Claimant was liable to pay could be sought from the Local Authority - the disadvantage was more apparent than real.
4. The retrospective success fee was "abhorrent" and irrespective of any success fee, was unenforceable particularly if it was made after the revocation of the CFA Regulations in November 2005 but related to a period when the Regulations remained in force and the solicitor would have had to have complied with the notice requirements in those Regulations.	There was no prohibition on retrospective CFA's and no reason per se why a retrospective success fee was contrary to public policy (the unreported case of <u>Adam Musa King -v- Telegraph Group Limited</u> was disapproved). The Court could disallow or reduce retrospective success fees that were unreasonable and even if the decision to allow a retrospective success fee was wrong, the Court could delete the success fee leaving the obligation to pay unaffected. A retrospective CFA did not have to comply with the notice requirements in Regulation 4 of the old Regulations and the second CFA was not invalid because it extended back to a period of time before the Regulations were revoked.



## Useful Information...

# “Cash is King” - Ensuring your firm survives the Credit Crunch

## “MORE businesses fail for lack of cash than for want of profit”

Everyday there is news of shut-downs, redundancies, and administrations across many industries and the legal world is not immune. According to Rupert Hawke ACMA, finance manager at leading criminal and business defence firm Cartwright King, it is inevitable that some law firms will go to the wall over the next couple of years because they can't ride out the recession.

The laws of economics suggest recession is the way to root out the weak and allow the strong to regroup and move forward again in better economic times. In that sense it could be argued that recession is no bad thing but it is little consolation to firms facing meltdown. However, by understanding cash flow mechanics and implementing a number of simple procedures, financial pressure can be relieved.

Cash is the name of the game in the current climate. Even though a firm may be profitable, it can still go out of business by running out of cash. For example, turnover might be constant but if

work-in-progress is rising at the same time then liquidity by definition is falling.

Cash levels can be adversely affected in many ways for example by a slowdown in turnover, less availability of credit and larger risk of private debtors defaulting. Cash management is therefore more important than ever.

Central to this is the optimisation of the Working Capital Cycle (WCC) which, in the case of a legal firm, is the time it takes to complete a case and be paid for the work. The longer the cycle, the less liquidity there is in the firm.

The key therefore is to reduce the cycle thereby releasing cash into the business. There are a number of things that can be done at different stages of the cycle which can make a real difference.

At the work-in-progress stage for instance fee-earners need to be encouraged to push through cases as quickly as possible, and getting fees in advance from private clients not only reduces WCC days but also reduces bad debt further down the line.

When it comes to billing, it is vital to ensure this is happening on a regular basis

and is accurate.

It is also important to have a well managed credit control function that keeps on top of debtors. The older debt becomes, the more difficult it is to collect. There needs to be an accurate cash flow forecast in place which is reviewed and adjusted on a regular basis so that cash can be managed effectively and nasty surprises are avoided.

“Brainstorming can help to uncover other ideas to improve liquidity as everyone can contribute to making a difference,” said Rupert. “Law firms are no different to any other business. Cash really is King!”

**We are grateful to Cartwright King for permission to reproduce this article.**

## Agreeing extensions of time in detailed assessment proceedings

IT is very common to find the parties in a costs negotiation agreeing to extend the time for commencing detailed assessment proceedings (Section 33 of the Practice Direction supplementing CPR Rule 47.7).

However, receiving parties should also remember that if points of dispute are subsequently served but the parties continue to negotiate, the receiving party could fall foul of CPR Rule 47.14 which requires the receiving party to file a request for a hearing within three months of the expiry of the period for commencing detailed assessment proceedings. Obtaining an appropriate extension of time for requesting a hearing will avoid the paying party having the opportunity to make this point. Failure to do so can result in interest being lost and if the paying party applies for an order requiring the receiving party to request a hearing, the paying party can also ask for some or all of the costs claimed to be disallowed.

## Lord Justice Jackson's review of civil costs

THE Association of Law Costs Draftsmen has recently made submissions to Lord Justice Jackson's review committee. In summary, the recommendations of the ALCD are:-

- Fee-shifting remains the fairest method of costs recovery;
- The indemnity principle should be retained;
- Before-the-event (BTE) insurance is the preferred form of alternative funding for the majority of civil cases;
- Conditional fee agreements should be used where no BTE is available;
- Contingency fees should only be

used where there is no alternative method of funding;

- All costs should fall under the control of the Supreme Court Costs Office;
- There should be greater use of budgeting/estimates;
- Estimates and regular updates should be compulsory, with sanctions for non-compliance; and
- There should be new “provisional assessments” for costs of up to £25,000.00. This would include brief points of dispute and replies, or alternatively, be by way of a hearing without points of dispute.



## Useful Information...

# A statement of costs is not just an estimate - There's a vital difference

THE fast track trial in this personal injury case was adjourned in November 2005 when it became clear that further medical evidence was necessary. Following re-allocation to the multi-track, the trial concluded in November 2006. The Claimant received damages of £8,000.00 (on a full liability valuation of £16,000.00).

The bill of costs subsequently presented by the Claimant exceeded £40,000.00. During the course of the detailed assessment, an interlocutory appeal was made by the Claimant in relation to two issues, the first of which related to the Claimant's costs up to and including the original (anticipated) fast track trial which should have taken place in November 2005. The District Judge during the assessment ruled that the statement of costs filed by the Claimant in advance of the anticipated fast track trial represented the limit of the costs claimed for the period up to and including the trial. The District Judge said that although the statement of costs satisfied the definition of a costs estimate for the purposes of Section 6 of the Costs Practice Direction, it had a greater "status" because of the required statement at the end: "The costs estimated do not exceed the costs which the Claimant is liable to pay in respect of the work which this estimate covers".

### On appeal, the Claimant argued:-

1. The District Judge's decision amounted to a retrospective costs cap.
2. The Defendant had not provided any

evidence of reliance.

3. That where costs are claimed which are more than 20% more than the estimate, this constitutes no more than evidence that costs are unreasonable or disproportionate.
4. That it was wrong to limit "merely" on the evidence of a statement of costs without considering another basis for dealing with the issue.
5. Leigh v Michelin Tyre plc [2004] 1 WLR 846 was authority for saying that a party should not be held to an estimate without an enquiry into the circumstances of the case.
6. The point that the Claimant was seeking more costs than those claimed in the statement of costs was not made expressly in the points of dispute.

### The Defendant argued:-

1. This was not a cost cap, it was simply a limiting of that part of the costs claimed for summary assessment in November 2005.
2. The statement was an estimate only in the technical sense and a greater importance had rightly been attached to it because it was the statement of costs which the Claimant would have relied on as being the actual cost of work reasonably done to that date.
3. No statement of reliance was necessary.
4. As there had been no explanation of the difference, the District Judge was open to regard any additional costs for the same period as unreasonable.

On appeal, HHJ Grenfell agreed with the Defendant that although a statement of costs satisfies the definition of a costs estimate, it has a greater importance because of its nature. Its purpose is to state the limit of the costs claimed and the District Judge had been right to regard the statement of costs as a certification of the maximum amount of costs incurred.

HHJ Grenfell added that there were circumstances where a receiving party who had certified his maximum recoverable costs up to a certain point could be allowed to reopen the statement. The most obvious example of this is where the statement contains errors. If this situation arises, of course, the affected party should make the position clear at the earliest opportunity and that party would need to explain the basis for wanting to go behind the certificate on the statement of costs.

The other issue decided by HHJ Grenfell in his interlocutory appeal related to an order made by the District Judge in the assessment that the Claimant's solicitor should disclose redacted timesheets for the period following the substantive claim's reallocation to the multi-track. The position concerning privilege was helpfully reviewed by HHJ Grenfell. He concluded that redacted timesheets were not themselves privileged and that the District Judge had used his case management powers properly to order disclosure of the time records because the Judge had considered that the detailed assessment was more likely to be compromised once the paying party had seen the actual records of time spent. This part of the judgment forms a useful reminder that the same wide case management powers are available to judges within detailed assessment proceedings as are available to them within substantive litigation.

Ref: *Stables -v- City of York Council Leeds County Court Case No. 4LS1120*

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