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



Debbie Burke ~ Editor

THIS is the fifth "Winter" editorial I have written for **Costs Recovery News**, but the only one which has been written in the shadow of the long-awaited publication of Lord Justice Jackson's review of civil costs.

Since the last edition of **Costs Recovery News**, opinions have continued to diverge as to whether the publication of this report will really herald a dramatic change in the civil litigation landscape or whether the reality is that an anticipated change of government coupled with the need for primary legislation before any truly significant changes can happen, will make the publication of Lord Justice Jackson's report nothing more than a damp squib.

At **Deborah Burke Costing Limited** we have undergone our own, far less dramatic, revolution. After six years we have bade a fond farewell to Madeleine Smith who has taken up a costing position in Birmingham. She will be sadly missed but ever quick to keep to our core business value of continuous improvement, we have taken the opportunity to increase the breadth of our team's skill set by welcoming Wayne Thorpe to our team. Wayne has more than twenty years' experience of the costs world, having worked for the Legal Aid Board and acted both for Claimants and Defendants. Most recently, he had an in-house position and Wayne's experience of working in-house will be particularly valuable as we continue to

build mutually beneficial relationships with our clients.

Last but not least, I must thank Jamie Carpenter and Hailsham Chambers for the article about costs estimates. Jamie's clarity of thought is particularly helpful in this ever more complex area. It may well be that the most lasting outcome from the Jackson review is a strengthening of the position so far as the courts are

concerned in relation to costs estimates. Costs budgeting could be just around the corner!

May 2010 be a year of recovery and business success for all. It is certainly time to ring the changes and the next time you receive our newsletter, you will see that we at **Deborah Burke Costing Limited** are doing just that

A Happy and Prosperous New Year to all our readers



Useful Information...

Beware the effect of your client's bankruptcy

AS the economic downturn continues, it is no surprise that greater numbers of people are being made bankrupt. When a client involved in litigation is made bankrupt, the retainer with the solicitor terminates by operation of law and the right to litigate automatically vests in the trustee in bankruptcy.

Even if the bankruptcy is subsequently discharged, this does not trigger a reversion of the right to litigate back to

the lay client. Without a right to litigate, the lay person cannot give instructions to his or her solicitor in relation to the action and work done by the solicitor will not be recoverable at the end of the litigation either from the client or the solicitor.

For the lay client to be able to continue to pursue the claim in his or her own name, there will need to be an assignment of the cause of action back to that lay client.



Watch this Space

Debbie and Victoria to speak at National Costs Conference

DEBBIE Burke and Victoria Hopkins will be speaking at the CLT Assessment of Costs Conference which is to be held on 11th May 2010. The topic will be "Solicitor/Client Relationships, Budgeting and Estimates".

Hourly rates review put on hold. . .

ON 23rd December 2009, the Master of the Rolls announced that he will wait until the Jackson report has been published before deciding whether to make any changes to the current guideline hourly rates.



Useful Information...

Getting your sums right

THE law on estimates offers help for both sides, says Jamie Carpenter

Increasing judicial concern about the costs of litigation has often centred on an apparent lack of forward planning. If lawyers budgeted better, so goes the thinking, then costs would be reduced, and estimating the likely costs involved in pursuing a case is an important part of the planning process.

If estimates - whether given to the client, court or opposing party - are exceeded, then that may indicate poor case handling and hence that the costs ultimately incurred are unreasonable. Estimates are therefore potentially an important part of the armoury of paying parties, whether clients or opponents.

This article examines the current state of the law relating to costs estimates, both in inter partes and solicitor-client estimates. It is assumed that the reader is aware of the circumstances in which an estimate of costs can and must be given. This article is concerned only with the consequences on assessment of an estimate which has been given being exceeded.

INTER PARTES

The leading case on the use of estimates in an inter partes assessment remains Leigh v Michelin Tyre plc [2004] 1 WLR 846. At the time, it was thought to be something of a damp squib: whilst inter partes estimates were important, they were not to be treated as a cap. A paying party who wanted to rely on a bad estimate would have to show that it relied on the estimate or that different case management directions would have been given had the court been aware of the true position. But a receiving party should not be punished simply for having given a bad estimate. If any more stringent sanction were to follow, it was for the Civil Procedure Rule Committee to come up with it and indeed it was invited to do so.

In September 2005, the Rule Committee seemed to do just that, when it amended Section 6 of the Costs Practice Direction. It added a new Section 6.5A, which requires a receiving party to provide a statement explaining any difference of 20% or more between any estimate previously given and the base costs claimed in the bill. In return, a paying party who wants to make use of the bad estimate has to serve a statement with his points of dispute saying either that he reasonably relied on it or that he wants to rely on it in order to dispute the reasonableness or proportionality of the costs claimed.

An amended Section 6.6(2) provides that, where there is a difference of 20% or more, and the receiving party has not adequately explained it or the paying party reasonably relied on it, "the court may regard the difference between the costs claimed and the costs shown in the estimate as evidence that the costs claimed are unreasonable or disproportionate".

That looks for all the world like a power to disallow costs on assessment simply because they exceed an estimate that was previously given by at least 20%, but I have yet to come across any case in which the new practice direction has been applied in that way. That is not to say that the argument is not worth making, though.

RELIANCE

But if a paying party still has to establish reliance on an estimate, what exactly do they have to prove? From the decisions in Mastercigars Direct v Withers LLP (No. 1) [2007] EWHC 2733 (Ch) and No. 2 [2009] EWHC 651 (Ch), it seems that they do not have to establish something amounting to an estoppel or a finding that, but for the estimate, they would probably have done something different. What a paying party probably has to show is that they were denied the opportunity of doing something different, for example

settling the claim. However, some reliance must still be established and it will not be if, for example, it was obvious that the paying party was fighting the case on principle.

Even if reliance is established, the court will not necessarily treat the estimate as a cap. In Tribe v Southdown Gliding Club [2007] EWHC 90080 (Costs), Master Gordon-Saker found reliance on a defendant's estimate in not obtaining ATE insurance with a sufficiently large limit of indemnity. Instead of treating the estimate as a cap, the Master decided what the range of realistic estimates would have been and based the assessment on a figure at the bottom of that range. The result was that the costs which the claimant had to pay were well within the ATE cover.

SOLICITOR CLIENT

The last couple of years have seen some major developments in the way the courts treat solicitor-client estimates. The decisions of Mr Justice Morgan in Mastercigars Direct v Withers LLP may require a complete change of approach from the way many people (practitioners and courts) have treated such estimates until now.

For many years, the common practice where a client's final bill exceeds an estimate previously given to the client, and there is no reasonable explanation, has been to cap the solicitors' costs at the estimate plus a margin of 15% or 20% and any other items not covered by the estimate. That practice was based on Wong v Vizards [1997] 2 Costs LR 46 and Anthony v Ellis & Fairbairn [2000] 2 Costs LR 277 and has the advantage of being straightforward and predictable.

However, in his two Mastercigars decisions, Morgan J sought to re-invent

Continued on Page 3



Useful Information...

Continued from Page 2

the wheel where solicitor-client estimates are concerned. Rather than laying down principles to be applied in every case, the Judge held that Wong and Anthony were simply examples of how a bad estimate might be reflected in a particular case. Not merely should the approach taken in those cases not be mechanically applied in other cases, it would very often be wrong in principle to do so.

Over the course of his two judgments, Morgan J undertook a masterful survey of every case on estimates, whether inter partes or solicitor client, with a view to establishing principles to be applied to future cases. However, despite that intention, the judgments leave some important questions unanswered.

The following principles seem to emerge from the two decisions. In most cases, an estimate will not operate as a contractual fixed price. Where that is not the case, the fundamental question for the assessing Judge is "What in all the circumstances is it reasonable for the client to pay?" An estimate can be a useful yardstick in answering that question.

A bad estimate must have been relied upon. As set out above in relation to inter partes costs, a client does not have to establish anything like an estoppel. The opportunity to have done something different, such as abandon the case or instruct other solicitors, will suffice. This should not be too hard to establish in practice. Once a client is locked into increasingly expensive litigation, it will be hard for the solicitors to say that the client cannot have relied on early estimates because they carried on with the case (see Reynolds v Stone Rowe Brewer [2008] EWHC 497 (QB)).

Where matters become less clear is in relation to what should be done once reliance is established. Morgan J's preferred solution, adopting - controversially - the inter partes dicta of Leigh v Michelin Tyres, seems to have been for the line by line assessment to

continue as normal with an adjustment made at the end to reflect the bad estimate. This would be both time-consuming and unlikely to lead to much reduction in practice.

However, it was not the only possibility. A costs judge could equally decide to reflect the estimate in other ways, including by way of a Wong style margin. But what Morgan J failed to explain was how a Costs Judge should decide which approach to take. Any approach must be justified, but what justification would suffice?

The Mastercigars decisions also leave unexplained the relevance of any explanation for the estimate being exceeded. It is clear that it is not per se relevant to the question of reliance, although the explanation may demonstrate that the client did not in fact rely on the estimate. Nor is it apparently relevant to the question of how to give effect to the estimate.

If the Leigh approach is adopted, then no doubt the explanation can be factored into whatever adjustment is thought

appropriate at the end, but if the estimate is reflected in any other way, at what point should it be considered?

Whether or not one agrees with Morgan J's approach (and his assessors certainly did not in the case of the first Mastercigars judgment), his decisions are binding on district and costs judges and it remains to be seen how they will be implemented in practice.

There is certainly scope for "business as usual", provided the right hoops are jumped through along the way. Between the two Mastercigars decisions Tugendhat J upheld a margin of 15% in Reynolds v Stone Rowe Brewer [2008] EWHC 497 (QB). However, those acting for clients will have to work much harder to achieve that result and there is plenty in the judgments to help those acting for solicitors to avoid it.

This article was first published in the Costs Lawyer on 5th September 2009 and is reproduced with kind permission.

Jamie Carpenter is a member of the costs team at Hailsham Chambers.



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Equity House • 47 Burton Street • Melton Mowbray • Leicestershire • LE13 1AF
Tel: 01664 482866 Fax: 01664 482867
E-mail: enquiries@dbcosting.co.uk Website: www.dbcosting.co.uk



Useful Information...

Law Autumn 2009

I was delighted to be asked to attend the Solicitors Group's popular conference, Law Autumn 2009 at the Birmingham NEC. Helping to man the company's conference stand was a fantastic opportunity for me, as a newcomer to **Deborah Burke Costing Ltd**, to sing the praises of my new colleagues and the services that have made the company the success it is.

Chatting to the delegates during coffee and lunch breaks, the same issues recurred in many conversations: frustrations with the bureaucracy involved in getting paid and dealing with complaints; fears about job security and surviving the recession; apprehension about the possible consequences of Lord Justice Jackson's forthcoming report on the costs system.

I had a fascinating conversation with a couple of young litigators working for a medium-sized firm. They told me that they were feeling a great deal of pressure from their superiors to increase their billing in order to safeguard their jobs, which raised two major difficulties for them. Firstly they were having to balance the drive to increase costs with their clients' desire to control fees very tightly during the recession. Secondly, the more chargeable time they tried to squeeze out of each day, the more they fell behind with billing and costs recovery.

I expressed the view that these are daily challenges for all lawyers which can be conquered with good organisation and (you've guessed it) close liaison with your law costs draftsman. Clients rarely complain about costs that they are already expecting to pay, so accurate estimates, with clear assumptions, are key. Falling behind with billing is a perennial problem, but it can be sorted out with a slick system of delegation. Costs should never be

shunted to the bottom of the "to do" list; after all, work in progress is not profit.

My conversations with delegates were certainly not all "doom and gloom". I met two solicitors who, eighteen months ago as the country teetered on the brink of an economic cliff, set up a new firm specialising in wills, probate and estate planning. With careful control of their overheads and excellent systems for communicating with their clients about costs, they have survived their first year and a half and are expanding.

It was gratifying to note that many of those attending were already familiar with **Deborah Burke Costing Ltd** and were receiving, and benefiting from, **Costs Recovery News**.

The feedback on the publication's contents was very positive, as was the feedback after Debbie shared the platform for Dominic Regan's talk on Part 36 offers and costs.

Victoria Hopkins
Deborah Burke Costing Ltd

50th amendment to the Civil Procedure Rules

THE 50th amendment to the Civil Procedure Rules is effective from 1st October 2009.

Tucked away within these amendments is a further change to the Practice Direction - Pre-action Conduct which was introduced in April 2009. The provisions of that protocol, Part 44.3(B) of the Civil Procedure Rules and Section 19 of the Costs Practice Direction have all been amended. Irrespective of the requirements of any other pre-action protocol, where a cfa is entered into on or after 1st October 2009, the party entering into the cfa must (our emphasis) inform the other parties of this fact as soon as possible and in any event, either within seven days of entering into the funding arrangement or (where a funding arrangement is entered into before a letter of claim is sent) in the letter of claim. In relation to any insurance premium, not only must the existence of the insurance premium be notified

to the other parties, it is now a requirement that the level of cover provided by the insurance and trigger points for increased premiums becoming payable (if there is a staged premium) must also be disclosed.

Changing "should" to "must" in the Practice Direction and removing the reference to "proceedings" in CPR 44.3(B) indicates that there may well be a significant tightening of approach in this area in relation to conditional fee agreements entered into after 1st October 2009.

The complete disallowance of a success fee and insurance premium is a significant penalty to incur for failing to abide by the Civil Procedure Rules and the linked provisions. Having to apply to Court to rectify the position is never ideal and in the light of these most recent changes, the courts may become increasingly reluctant in the future to intervene to rescue receiving parties.



Recent Cases...

Does it matter who sues whom?

MR Parkes and Mr Martin were involved in a road traffic accident. A liability trial took place at the end of which it was held that Mr Parkes had been driving too fast and had failed to see a pool of water. His car had overturned and ended up on the other side of the road. As Mr Parkes climbed out of his car, a lorry driven by Mr Martin collided with Mr Parkes' overturned vehicle. Both drivers were injured, Mr Parkes the more seriously.

Both drivers blamed the other and both prepared cases for issue. In the event, Mr Parkes issued first. Both sets of solicitors agreed that Mr Martin (the Defendant) would not issue a counter claim and that the matter would proceed to a trial on liability which took place in November 2008.

After a morning in Court, the trial judge found for Mr Parkes (the Claimant) on liability subject to a contributory negligence deduction of 65%. The Claimant's counsel then asked the trial judge to award costs to the Claimant.

Costs Recovery News

is published by

Deborah Burke Costing Limited

Equity House, 47 Burton Street

Melton Mowbray, Leicestershire

LE13 1AF

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The trial judge asked whether there was any reasons why the costs should not be divided in the same proportion as liability. Counsel for the Defendant then referred to the fact that although there was no counter claim, the Defendant's claim did "by the wayside". The trial judge then referred himself to CPR 44.3(4) (which deals with the factors to consider when deciding what, if any, costs order to make) and concluded that justice was served by awarding costs in the same proportion as liability - the Claimant would receive 35% of his liability costs.

Unsurprisingly, the Claimant appealed the decision of the trial judge. On behalf of the Claimant, it was argued that the trial judge was first required to decide whether it was appropriate to make an order for costs - in this case the trial judge clearly thought it was. Following on from that, the general rule was that the unsuccessful party must pay the costs of the successful party. Referring specifically to CPR 44.3(4) the Claimant was the winner because he had established liability (although there was a substantial reduction for contributory negligence). The Defendant had made no settlement offer. The Defendant could not be said to be the substantial winner.

The Defendant's counsel relied on the fact that both parties had a damages claim arising out of the accident (either party could have commenced proceedings) and that once the claim began, the parties agreed that the determination of liability in the Claimant's claim would be determinative of the liability outcome of both claims. Counsel for the Defendant maintained that the existence of the "costs claim" was "fundamental" and was the key to the way in which the judge had exercised his discretion.

Lord Justice Rimer began his judgment by admitting to having reservations as to whether the judge did have regard to the costs claim. He pointed out that the trial judge had proposed a division of costs in the same proportions as liability BEFORE any mention was made of the costs claim. When it was mentioned, it was only mentioned in a "short-hand" way and when the order was made, the order was in line with what the trial judge had originally proposed. Despite this, the Court of Appeal dismissed the Claimant's appeal on the basis that the trial judge was aware of the costs claim when making the original costs order.

Interestingly, Lord Justice Rimer concluded by saying that if, in fact, the trial judge had not taken the costs claim into account, the costs order made would have been made as a result of a misdirection. The order could then have been set aside by the Court of Appeal.

This is a puzzling decision. The Medway Oil case [1929] AC 88 is long standing authority for saying that in a case where each party makes a claim, the correct order might be that there should be no order on the claim. That would leave the Defendant only able to recover additional costs of the counter claim. In this case, there was one formal claim and one informal claim.

The Claimant made more than one Part 36 offer but the Defendant made no offers and yet the Defendant was able to recover 35% of his liability costs (quantum costs would of course be decided separately). Could this judgment mean that in the future both sides will want to proceed with a "formal" claim and how does this fit in with the overriding objective?

Ref: *Christopher Malcolm Parkes v Laurence Martin* [2009]
EWCA Civ 883