

'The Costs Column'



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THE latest judgment in the long running saga of the Myatt (No. 2) (1) case serves as a salutary lesson to solicitors about the dangers of pursuing litigation substantially or wholly for their own benefit (**Cost Recovery News** - Issue 10, download available from www.dbcosting.co.uk)

In addition, after almost two years of uncertainty in relation to compliance with the Conditional Fee Agreements Regulations 2000 (for pre November 2005 conditional fee agreements), the Court of Appeal judgments also represented a hardening of the position adopted in Hollins v Russell (2) concerning the test of "materiality" to be applied to any breach of the Regulations. Lord Justice Dyson in Myatt and Garrett (3) has said that there is no requirement for actual prejudice to the lay client, because "materiality" is determined at the date of the conditional fee agreement.

This sounds like it is all bad news for solicitors. However, whilst the judgments in Myatt and Garrett are, of course, binding on lower courts, they do not always seem to be in keeping with the decisions which are now being made "on the ground". Here are a couple of cases which have come to my attention recently.

In an appeal to Regional Costs Judge HHJ Thorn QC, from a detailed assessment in the Kingston-upon-Hull County Court (4), where the modest damages of £5,800.00 were agreed by the parties without the need to issue proceedings, the Claimant's conditional fee agreement was disclosed voluntarily. However, the paying party sought the further disclosure of attendance notes to evidence compliance with Regulation 4(2)(e) of the Conditional Fee Agreements Regulations 2000. Hollins v Russell confirmed that whilst attendance notes would not ordinarily be disclosed, they might be if a "genuine issue" was raised. The best that the paying party could argue in this case was that an attendance of 18 minutes duration was not long enough for the fee earner to have engaged in the discussions with the client which were required by the relevant regulations. Both the District Judge on detailed assessment and the Regional Costs Judge on appeal refused to find that this, on its own, raised a "genuine issue".

This judgment was echoed in a case in the Supreme Court Costs Office in February of this year (5). Master Howarth held that the power to order disclosure pursuant to Rule 47.14 of the Civil Procedure Rules and paragraph 40.14 of the Costs Practice Direction, did not arise until after detailed assessment proceedings had commenced and then ONLY if the paying party had first raised a "genuine" issue.

The rationale behind these cases and the case of Bailey (6) is that "as officers of the court, solicitors are trusted not to mislead or to allow the court to be misled".

Making sure that the claim for costs is accurate before the bill of costs is signed is crucial. Once the bill has been signed, speculative attempts by the paying party to go behind the signed certificates within the bill of costs should be resisted. The paying party should be reminded of the need to establish a "genuine" issue within the detailed assessment process.

In addition, Rule 2.03 of the new Solicitors' Code of Conduct 2007 spells out that the lay client must be given up-to-date written information about the likely overall cost, together with further specified information arising out of the funding of the litigation by conditional fee agreement. This is just as relevant during the detailed assessment process as it is at earlier stages of the litigation. As the most recent Myatt judgment shows, running costs litigation for the benefit of the solicitor rather than the lay client is to be avoided at all costs.

(1) Myatt & Others v National Coal Board (No. 2) [2007] EWCA Civ 307

(2) Hollins v Russell [2003] EWCA Civ 974

(3) Garrett v Halton Borough Council and Myatt & Others v National Coal Board [2006] EWCA Civ 1017

(4) Bradbury v London & Cambridge Properties Ltd (not reported)

(5) Ashley Cole v News Group Newspapers

(SCCO - February 2007 - substantive assessment is ongoing)

(6) Bailey v IBC Vehicles Ltd [1998] EWCA Civ 566

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