

'The Costs Column'



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Many of you will have glanced, at least in passing, at the Court of Appeal judgment in the case of Crane v Canons Leisure Centre ([2007] EWCA Civ 1352) which was delivered just before Christmas. Lord Justice May delivered the lead judgment, Lady Justice Hallett delivered a concurring judgment but stated that it was not an "entirely happy result" and Lord Justice Maurice Kay delivered a dissenting judgment.

As an independent costs draftsman, I had been eagerly awaiting the judgment, to see what would be said about the recoverability of success fees on costs draftsmen's charges. The unequivocal judgment of Lord Justice May in Crane is that the work done preparing the bill of costs for Mr Crane, was "solicitors' work" for which the Claimant's solicitors were entitled to make a direct charge. A success fee on the bill preparation time is, therefore, recoverable (paragraph 15).

However, what has fascinated me about the judgment is that every time I read it, I see something else of interest. Here is my list of favourites to date:-

- All of you who are familiar with the standard basis of assessment - any doubt is resolved in the paying party's favour - beware. When the issue before a court is one of "construction," the basis of assessment will not necessarily assist the paying party (paragraph 13). This is particularly interesting because the Claimant's solicitors claimed the costs draftsman's charges in both the initial schedule and subsequent bill of costs as a disbursement. It was "not until late in the day" that the argument was put forward that the work done should form part of the profit costs.
- Costs drafting work is "solicitors' work" and a characteristic of such work is that the solicitor remains responsible to the client for its proper conduct (paragraph 14).
- The classification of the work done in preparing a bill of costs does not depend on whether the Claimant's solicitor did the work himself or whether it was delegated to another solicitor or delegated to a costs draftsman who was not a solicitor (paragraph 15).
- If solicitors properly delegate their own work, they remain entitled to charge for that work "on their own account" and the amount paid to the subcontractor is not necessarily the same amount that is claimed from the paying party (paragraph 14). The same paragraph highlights that the success fee allowed on the draftsman's work in the Crane case would go to the Claimant's solicitors and not the costs draftsman.
- The success fee in a conditional fee agreement is designed to cover the cost of other cases which the solicitor loses where he or she gets paid nothing, not the profit on the case in question which has been won (paragraph 20). Although this point was

much heralded when additional liabilities first became recoverable from paying parties, so many times at assessment, the success fee has been judged solely against the case in question, with no regard for the bigger picture.

- The Respondent's notice in the appeal proceedings argued in the alternative that a success fee of 45% for conducting the costs assessment was unreasonable - the only risk in the assessment process was that a costs offer by the Defendant would not be beaten on assessment. Lord Justice May reminds us in paragraph 18 that the Halloran v Delaney decision centered on the assessment of the risk of not winning the litigation, not on whether there should be a separate success fee for assessment proceedings. Paragraph 21 of the Crane judgment confirms that the success fee should extend to the costs proceedings at the same rate (provided that this has been agreed with the client).
- The Court of Appeal is saying, yet again, how "unsavoury" this type of costs satellite litigation is (paragraph 1) and Lord Justice May refers in paragraph 15 to "poor Mr. Crane [who] had no interest in this costs squabble".
- In his dissenting judgment, Lord Justice Kay expressed his concern that the creation of conditional fee agreements had resulted in a situation in which the unsuccessful defendant or his insurers became liable for the subsidy paid to the successful claimant's lawyer to compensate him for his otherwise unpaid work on unsuccessful cases (paragraph 24). Lord Justice Kay highlighted that not all defendants are insured, so that it is particularly important for the courts to ensure that success fees do not operate unjustly on the ultimate paying party.
- Lord Justice Kay concludes by saying that the time may now be approaching when the working of the conditional fee agreement system is "ripe for an in-depth review" to measure to what extent the system is enhancing or impeding access to justice and at what financial cost.

Lord Justice Kay's dissenting judgment and Lord Justice May's comment that the small claims track limit should be substantially increased (paragraph 1) echo two of the recommendations of the Civil Justice Council's report "Improved Access to Justice". My prediction is that it will not be very long before we hear calls again for the small claims limit to be increased and for other funding options to be investigated. As always, we live in interesting times...

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