

'The Costs Column'



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Two recent "announcements" will have caught the eye of costs draftsmen and litigators alike.

First, the much awaited Kilby v Gawith judgement. Secondly, the root and branch review of the costs system which is to take place under the auspices of the Master of the Rolls.

Nearly everyone will have heard something about the Kilby case. It was a typical rta where liability had been admitted and the Claimant, who had the benefit of before-the-event insurance entered into a cfa with her solicitor. The Claimant recovered damages (without the need to issue proceedings) and costs followed the event. However, the Defendant disputed the recovery of the fixed success fee of 12.5%.

The Defendant argued that the court had discretion whether or not to allow a success fee. The full transcript of the Court of Appeal judgment is not yet available although numerous articles about the case have already appeared.

What seems clear is that the Court of Appeal has held that while CPR 45.11(1) refers to the fact that a Claimant "may recover" a success fee, this has to be construed by reference to its ordinary natural meaning, which is that where a success fee is recovered, it has to be 12.5%.

This reinforcement of the need for certainty in the cfa regime is very reminiscent of the decision in the 2007 case of Nizami v Butt which has been referred to by the Court of Appeal in its judgment. In the Nizami case, the lack of a valid retainer was held to be no bar to the recovery of predictable costs.

The majority of the comments I have seen so far on the Kilby judgment seems to concentrate on two implications arising out of the Court of Appeal's judgment. First, the fact that Claimant firms can (with the right structuring and making sure that the Solicitor's Code of Practice is complied with) increase revenue by 12.5% at no extra "cost" and secondly, that the insurance market will be thrown into further turmoil by this decision.

Both of these considerations are obviously important, but in reality the costs certainty in predictable costs cases which the Court of Appeal is so keen to shore up, will, I think, be very much overshadowed by the Master of the Roll's review.

The front page of the Law Society Gazette for 19th June 2008 reported that the costs review should be underway by the beginning of 2009, with a report due by July 2009. The article in the Gazette indicates that other types of funding will again be looked at, including conditional legal aid and contingency fees. It indicates that the current approach to proportionality may be reconsidered - perhaps by limiting the amount of costs which can be recovered from the losing party to a figure which bears some relationship to the amount recovered by the winning party.

The Master of the Rolls has had a busy year so far. In May, he gave a speech at the Civil Mediation Council's National Conference in Birmingham. In that speech, Sir Anthony Clarke said that the power exists for the courts to regularise mediation and to make it an integral part of the litigation process. The Master of the Rolls ended his speech by saying that "every assistance" (which could include court directions) should be given to litigants to enable them to settle disputes through mediation and that to fail to do so would be a "disservice".

With a renewed push for mediation and a wholesale review of the costs recovery system looming, litigators would do well to focus past the immediate effect of the Kilby judgment and to prepare for what could well be substantial changes to the costs recovery system, just over the horizon.....

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