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costs recovery

news

The Quarterly Newsletter from **DEBORAH BURKE COSTING LIMITED** ~ Law Costs Draftsmen and Consultants

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Debbie Burke ~ Editor

our office and it is not unknown for us to send our copy on short term loan to a client!

I welcome our new subscribers to **Costs Recovery News** via our website www.dbcosting.co.uk. We are pleased to see that more and more of our readers are making use of the information and forms available on our website.

The team at Deborah Burke Costing Ltd is currently working on a costs news update service which will be e-mailed free on a regular basis to subscribers to **Costs Recovery News**. To take advantage of this new service, all you need to do is to register online for **Costs Recovery News**. Please also remember that all the previous issues are available for you to view on our website.

IMPORTANT: Please note that further issues of **Costs Recovery News** will be available in electronic format only. If you wish to receive future copies, please subscribe via our website at www.dbcosting.co.uk

BEFORE I sat down to write this editorial, it didn't seem that much had happened in the costing world since our last edition of **Costs Recovery News** in March 2007. However, from the comprehensive revision of the Part 36 procedure, through to the latest decision in the long running **Myatt** litigation and the mediated agreement in relation to medical agency fees, all of which are covered in articles in this edition, it is yet again a case of all change please!

I have been reading elsewhere about the government's proposals to introduce daily court fees for trials and quite separately about the roll out of the Ministry of Justice's small claims mediation scheme at county courts across the country. These moves chime very much with the continuing push to achieve settlement before trial in as many cases as possible, which is, of course, entirely in keeping with the revised Part 36 provisions.

I am delighted to recommend to you the article by Peter Burdge. Peter's step by step guide to costs recovery, the **Civil Costs Assessment Handbook**, deals in a brilliantly straightforward way with everything that happens between receiving the bill of costs and getting the final costs certificate. It is a favourite in



Cases in Brief...

A breach of the indemnity principle?

DR. Ilangaratne was the unsuccessful Claimant in a negligence action against the BMA and was ordered to pay the BMA's costs. The BMA had defended the claim with the assistance of insurers, who had then instructed solicitors.

Dr. Ilangaratne argued that there was no retainer between the solicitors and the BMA which was a breach of the indemnity principle. Although this argument was rejected (*In my judgment consistent with the typical case where solicitors are retained by an insurer for its insured customer, the inference of a retainer by the customer is easily, normally and appropriately drawn*), some concern was expressed with regard

to the rates applied by the solicitors which were considered to be *significantly higher than those they would expect to see in cases of this nature where insurers are funding the defence*.

In actual fact, the solicitors had a prior agreement with the insurers including an agreement as to charging rates. A charging rate of £110.00 per hour had been agreed for a trainee solicitor, whereas £115.00 per hour had been claimed in the bill and it was held that it was up to the solicitor to prove that the higher charging rate had been expressly agreed with the client, to avoid any breach of the indemnity principle.

Ref. Dr. J B Ilangaratne v British Medical Association
Neutral Citation Number: [2007] EWHC 920 (Ch)



Recent Cases...

Know what to ask for and ask for what you want

THE appeal in this matter raised the question of whether a costs judge has the jurisdiction at the outset of a detailed assessment to order a paying party to pay only a proportion of the costs sought.

The claim arose from a personal injury suffered by the Claimant during the course of his employment by the Defendant. Prior to the issue of the proceedings, the Defendant had offered £5,000.00 in settlement. This offer was not accepted and proceedings were issued on 31st March 2004 and the claim quantified at approximately £150,000.00. In September 2004, the Defendant made a part 36 payment of £2,000.00 which was subsequently increased in January 2005 to £4,000.00. On 27th January 2005 the Claimant accepted £4,000.00.

The Claimant's solicitor's bill of costs totalled £27,029.63, which included a 75% success fee and disbursements. Of that figure, the solicitor's base profit costs amounted to £11,487.00.

The matter proceeded to detailed assessment when the Defendant asked the district judge to order, before embarking on the detailed assessment hearing itself, that the claimant should be awarded only 25% of the assessed costs.

The district judge decided to determine as a preliminary issue whether he had jurisdiction to make such an order and he decided that it was not in the power of the Court to order any reduction in the incidence of the costs arising out of the Part 36 payment and its acceptance within time.

During the detailed assessment it was found that the bill was disproportionate and the higher standard of necessity was applied. The bill was reduced to £15,182.71 inclusive of VAT. The Defendant was given permission to appeal. The appeal was heard by His Honour Judge Appleton on 6th June 2006 when he concluded that the district judge had reached the right conclusion and dismissed the appeal. Brooke LJ gave permission to appeal to the Court of Appeal because he thought that the case raised an important point.

The further appeal came before the Master of the Rolls, Lady Justice Arden, Lord Justice Dyson and Master Hurst. It was held that on acceptance of a Part 36 payment under CPR 44.12(1)(b), a costs order was deemed to have been made on the standard basis. This meant that the Claimant was entitled to 100% of the assessed costs, i.e. the amount arrived at, at the end of the detailed

assessment. The district judge had no power to vary this deemed costs order and to decide that the Claimant was only entitled to a percentage of the assessed costs.

There is a real distinction between (a) carrying out an assessment and deciding as part of the assessment to reduce the bill by a percentage and (b) deciding in advance of the assessment that the receiving party will only receive a percentage of the assessed costs [paragraph 20].

In any event it was not necessary to give the costs judge the power sought because the power already existed for entire parts of a bill to be disallowed, or for the costs relating to a certain issue to be disallowed.

In this particular case, the Defendant could have sought to have all the post-issue costs disallowed on the basis that the Claimant had acted unreasonably in refusing an offer to settle before proceedings were issued. Perhaps that would have been the better course of action.

Ref. Joseph Lahey v Pirelli Tyres Limited

Neutral Citation Number: [2007] EWCA Civ 91

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Are your arrangements for costs recovery letting you down?

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- Unreasonable demands from your costs draftsman for quick payment

IF SO, THEN WE PROVIDE THE ANSWER

BACKGROUND INFORMATION

I would like to introduce the costing team at Deborah Burke Costing Ltd and to let you know how we can help to improve your profitability.

I was a practising solicitor who trained for five years with a national costing business before starting up my own business in 1998. I am a Fellow of the Association of Law Costs Draftsmen and the editor of our own quarterly costs publication, **Costs Recovery News**, previous issues of which can be viewed on our website at www.dbcosting.co.uk

We deal with all costing issues arising out of litigation. Our clients include high street legal practices through to large public bodies and in-house legal teams.

BUSINESS OVERVIEW

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Our "Seven Pillars of Wisdom":

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- We forewarn our clients about potential difficulties in recovering costs.
- We provide accurate and technically competent advice to our clients and to their lay clients.
- We offer free advice to our clients on how to increase their efficiency and their ability to deliver the legal services which they provide.
- We provide our clients with regular costs information via our newsletter, **Costs Recovery News**, previous copies of which are available to view on our website, at www.dbcosting.co.uk/newsletter.htm

TERMS AND CONDITIONS

Our pricing structure is competitive and standard payment terms are thirty days from the date of the invoice. However, for regular clients, we are happy to enter into arrangements to allow for the payment of invoices by statement and for extended payment dates. Our standard turnaround for bill preparation and the preparation of costs estimates is ten days, subject to the size of the file and the urgency of the matter. Instructions to advise will usually be actioned within two working days.

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Yours sincerely



Debbie Burke (Mrs) FALCD
DEBORAH BURKE COSTING LIMITED



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Recent Cases...

A Part 36 anomaly?

THE Claimant was injured in a road traffic accident on 10th September 2004. He instructed solicitors under a CFA and took out ATE insurance. The Defendant admitted liability, proceedings were issued in June 2005 and a Part 36 payment of £1,800.00 was made on 16th August 2005.

The payment was rejected and the matter went to a "disposal hearing" on 13th September 2005 when the Claimant was awarded damages of £1,774.32. The Claimant was awarded costs up to 7th September 2005, the latest date on which the Part 36 payment could have been accepted

without the permission of the Court, and ordered to pay the Defendant's costs incurred since 8th September 2005.

The Claimant's costs were summarily assessed at £4,550.92, comprising base costs, a success fee of 100%, disbursements and VAT.

CPR 45.16(a) provides that the percentage increase to be allowed in road traffic accidents to which Section III of Part 45 applies (as in this case) is 100% where the claim concludes at trial. However, the Defendant submitted that if the Claimant had accepted the Part 36 payment within the time limit,

the success fee would have been limited to 12.5% and that there should be discretion to limit the amount of the success fee in cases where the Part 36 payment was not beaten and where Section III of Part 45 applies.

The Court of Appeal held that although there may well be a case for deciding that, where a Claimant fails to better a Part 36 offer or payment, he should only be allowed the same success fee as he would have recovered if he had accepted the offer, that is not the effect of the Rules in their present form and the appeal was therefore dismissed.

*Ref. Lamont v Burton
Neutral Citation Number [2007] EWCA Civ 429*

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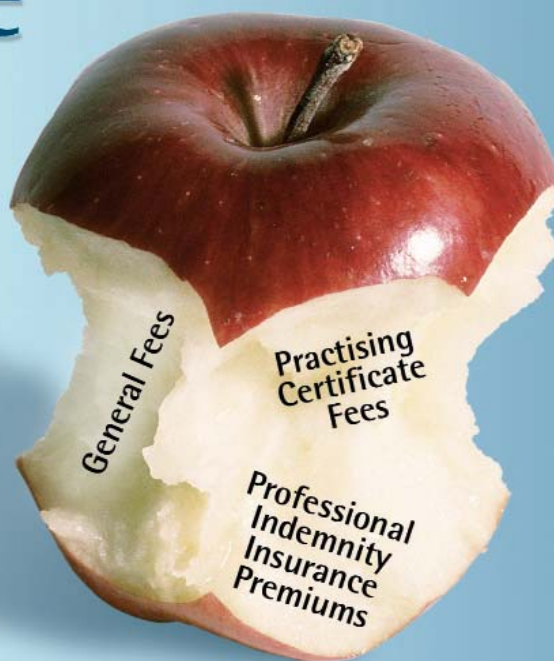
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Recent Cases...

Solicitors beware!

AS you will all remember, Messrs. Ollerenshaws acted under CFAs for a number of coal miners who sued for damages for noise-induced hearing loss. Four cases, including that of Myatt, were treated as test cases and in August 2005 it was found that the conditional fee agreements entered into between the Claimants and their solicitors were unenforceable because of a breach of Regulation 4(2)(c) of the Conditional Fee Agreements Regulations 2000. The appeal to the Court of Appeal was dismissed in July 2006 when the issue of costs was adjourned generally.

The Defendant applied for an order for costs against the Claimants' solicitors. The Defendant argued that because Ollerenshaws were acting for about 60 other cases where clients had entered into similar CFAs, the real issue at stake in the appeal was Ollerenshaws' entitlement to profit costs for those cases of around £200,000.00. The Claimants also had a financial interest in the appeal because they would be responsible for any disbursements which were irrecoverable against the Defendant (including the cost of the insurance premiums). The Court of Appeal held that the

question to be decided was *whether, despite the Claimants' financial interest, there is jurisdiction to order that Ollerenshaws should pay some or all of the Defendant's costs and if so how that jurisdiction should be exercised.*

It was held that the fact that the Claimants themselves had a financial interest in the outcome should not deprive the court of jurisdiction to make an order against the solicitors. The solicitors' financial interest in the outcome of the appeals was far greater than that of the Claimants and the main reason why *this expensive appeal was launched was to protect Ollerenshaws' claim to their profit costs.*

However, the Defendant had not warned Ollerenshaws that if the appeal failed it would apply for an order for costs against the firm personally and the failure to do this was a factor to be taken into account in deciding whether or not to make an order against Ollerenshaws. The solicitors were ordered to pay 50% of the Defendant's costs of the appeal. Lord Justice Dyson stated that *it is important to emphasise the need for parties who think that they may apply for an order for costs against solicitors in circumstances such as obtained in the present case to warn the solicitors at an early stage, so as to give them a reasonable opportunity for deciding whether or not to continue with the proceedings.*

It is important to remember that this decision does not mean that where a client is represented by a solicitor under a CFA, the solicitor becomes liable for the costs if the case fails. This judgment is confined to cases where the litigation is pursued wholly or to a substantial degree for the benefit of the solicitor.

Lownds again....

FOLLOWING the conclusion of a fast track trial in respect of a road traffic accident, the Claimant was awarded damages of £3,017.12. The Defendant was ordered to pay the Claimant's costs and these were summarily assessed at £7,881.63. The District Judge disallowed the costs of the costs consultant for preparing the costs schedule, reduced counsel's fees for the trial to the appropriate fixed fee of £500.00 and reduced the solicitor's profit costs from £6,668.10 plus VAT to £2,000.00 plus VAT.

The Claimant appealed on the ground that the District Judge should have ordered a detailed assessment because there was insufficient time to conduct a proper summary assessment or to hear submissions on costs from counsel and that the two-stage approach advocated in *Home Office v Lownds* [2002] EWCA Civ 36 should have been followed. The Defendant maintained that *Lownds* only applied to detailed assessments and not to summary assessments. His Honour Judge Hickinbottom sitting in the Cardiff

County Court found that the District Judge had been correct in summarily assessing the costs but that he had failed to adopt the two stage approach to proportionality as required by *Lownds*.

In addition, there were difficulties with the statement of costs which had been put before the District Judge and on which the summary assessment was based because it had not been signed and was not in the form required by Form N260.

With reluctance, the appeal was allowed and the District Judge's order was varied to provide for detailed assessment. However, the order also required the deficiencies in the statement of costs provided by the Claimant's solicitors at the trial to be taken into consideration.

This case illustrates just how important it is that the statement of costs is signed and that it follows the format of Form N260.

Ref: *Sian Harries v Sean Summers* (2007)
In the Cardiff County Court. Claim No: 5CM02891

Ref: *Myatt v National Coal Board* (No. 2)
Neutral citation number: [2007] EWCA Civ 307



Recent Cases...

Exaggerated claims and proportionality

THE Claimant had been injured when travelling as a passenger in a car driven by the Second Defendant. The vehicle had been stopped by the police and as the Claimant got out of the car, a bus operated by the First Defendant hit the car causing the Claimant to fall onto the pavement. The bus did not hit the Claimant directly but the Claimant developed whiplash.

At the time of the accident the Claimant was unemployed (he had previously worked as a City metals trader) and he argued that he was in receipt of an offer for a very highly paid job, which was subsequently withdrawn from him because of his whiplash injury. The Claimant maintained that he had been offered the job during a game of golf and that details of the salary and bonus payments had been verbally agreed.

The claim was issued almost three years

after the accident and was valued at over £1.4m. The claim settled in January 2006 for £10,000.00 plus costs after a three day split trial on liability. Quantum was agreed without a trial.

The Claimant's solicitor's bill of costs amounted to some £54,000.00 excluding VAT. The Defendants maintained that the claim had been exaggerated, that the costs were disproportionate and that in any event, the Defendants had "won" because they had substantially defended almost the entirety of the claim.

Both sides referred to the case of **Lownds v Home Office**, in particular in relation to the question of how to approach the question of costs proportionality in a claim where much less was recovered than had been claimed.

The Deputy Master found that *it was a £1.4m claim based on a very sparsely described conversation during a game of golf, uncorroborated by other material and yet some three years had been spent in gathering evidence to support the claim.* In addition, the Claimant had rejected an offer of mediation, had not accepted the payment in of £10,000.00 when it was first made and had failed to make any counter-offer.

The Deputy Master found that the costs incurred were globally disproportionate and that his task was to apply the **Lownds** test of necessity, with the standard being *that to be expected in the conduct of a modestly valued routine road traffic accident case at the fast track/multi-track borderline.*

Ref. Paul Sheridan Finster v (1) Arriva London (2) Steven Booth (2007)

SCCO Reference CCD0604044/Claim No. 4BK05734

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Useful Information...

'Costs only' proceedings can work wonders

by **Peter Burdge**,
the author of the **Civil Costs Assessment Handbook**
(available from the Law Society:
0870 850 1422
lawsociety@prolog.uk.com)

PERHAPS because 'costs only' proceedings don't fit neatly into the general scheme of things, many practitioners seem reluctant to try them. This is a pity because they are quite simple and can work wonders on opponents who refuse to make sensible offers.

If your client settles a claim, without having issued proceedings, on terms that their opponent is to pay the costs, but you cannot reach agreement on the amount of those costs, you can only get those costs assessed by the court if there is an order for detailed assessment. 'Costs only' proceedings enable you to get that order.

The rules are in CPR 44.12A and the procedure in section 17 of the Costs Practice Direction. You issue a Part 8 claim form identifying the claim that gave rise to the agreement to pay costs, attaching copies of your supporting evidence (normally the exchange of correspondence by which settlement was reached), stating the amount claimed and setting out the terms of the order you want. The court fee is £35 (county court) or £50 (High Court).

Unless the Defendant contests the claim (in which case the court has to dismiss it, regardless of its merits) you will get the order.

Your opponent may ask you to agree directions setting out a timetable for the detailed assessment proceedings (eg to shorten the process where points of dispute have already been served), but the rules make no provision for this, so the court can refuse to include these in the order. As a minimum the order should state that the defendant is to pay the claimant's costs of the claim in respect of which terms of settlement have been agreed and that the Claimant is to commence detailed assessment proceedings in accordance with CPR Rule 47.6. You will probably also want it to say that the costs of the application are to be 'in the assessment' ie whoever is awarded the costs of the detailed assessment proceedings gets these costs as well.

Once you have the order, unless it includes any directions of the sort mentioned above, you are in exactly the same position as in a normal case. You have three months from the date of the order to serve the bill, your opponent has 21 days to serve points of dispute etc. Having shown that you mean business you may find it easier to reach a satisfactory settlement. The fact that statutory interest starts to run from the date of the order also adds to the pressure on your opponent.

Part 36 - all change?

You may remember the case of Trustees of Stokes Pension Fund which we covered in issue 2 of **Costs Recovery News**. In that case, a Part 36 offer was held to have the same effect as a payment into court. There followed a Consultation Paper on Part 36 offers and as a result of this process, an extensively revised procedure for making Part 36 offers came into force last month. Some of the major points are:-

36.2

- the definition has been tightened up and Part 36 offers may be made solely in relation to liability.

36.3

- any offer made by a party to an appeal in the court below, must be repeated or another offer made in order to protect the party's position in the appeal proceedings.
- In addition, before expiry of the relevant period, permission of the court is needed for the offeror to withdraw the offer or to change its terms so that it is less advantageous to the offeree. After the relevant time has expired, an offer which has not been accepted may be withdrawn at any time without permission.

36.4

- the offer must relate to a single payment of money, not payment by instalments but it is no longer necessary to make a payment into court

36.11

- Once an offer is accepted, the proceedings are stayed. This means that the case has, to all intents and purposes ended, apart from the quantification of costs (and enforcement if required).
- If the offeror fails to pay the agreed sum within 14 days, the offeree can enter judgment for the sum and must enforce that judgment - the offeree cannot simply re-start the proceedings.

There are special provisions relating to specific situations, e.g. offers made by one but not all defendants and there are also transitional provisions which set out when the old procedure is to be applied and when the new procedure is applied to old offers and payments into court.



Watch this Space

Carter Reforms - Family Harmonised Rates

Although the majority of the reforms under the Carter Report will not be implemented until October 2007, do not forget that the harmonised family rates will apply to all work done under all Public Funding Certificates **issued after 2nd April 2007 relating to family matters**. This means that the same rate is applicable to work done in the Family Proceedings Court and the County Court. Remember to make sure that your time recording programmes have been amended to show these new rates. Details of the new rates can be found on page 8 of Focus 53 [March 2007] which is on the LSC web site.

www.legalservices.gov.uk

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Back issues: Are available via our website at www.dbcosting.co.uk



Useful Information...

Medical agency fees

We have mentioned before the case of Wollard concerning the recoverability of medical agency fees within the predictable costs regime. In Issue 9 of **Costs Recovery News** [March 2007] we reported that the appeal had been stayed and the matter was mediated with the assistance of the Civil Justice Council. An agreement has now been reached between the leading medical reporting organisations and most of the UK's major liability insurers that provides a cap on the amount to be charged

for GP, Orthopaedic and A & E Consultant reports in road traffic accident, employment liability and public liability cases where general damages are not anticipated to exceed £15,000.00.

Two rates have been agreed, Rate A for payment within 90 days of receipt of the invoice and Rate B for payment after 90 days. This should mean that arguments about the recoverability of medical agency fees are now at an end.

	Rate A (payment within 90 days)	Rate B (payment more than 90 days)
General Practitioner Report - no notes	£195.00	£220.00
Review notes by GP	£50.00	£55.00
Orthopaedic Report - including review of notes	£425.00	£465.00
Accident and Emergency Report - including review of notes	£375.00	£410.00
Addendum	Costs + £25.00	Cost + £30.00
Costs of obtaining each set of medical records	Cost charged by data provider + £25.00	Cost charged by data provider + £30.00

Ref: Wollard and Fowler SCCO Ref: 0500761 (Claim No: 4LS08603)



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- The indemnity principle
- Terms of settlement
- The terms of experts' retainers
- Remuneration for non-contentious work
- The position in relation to in-house solicitors
- After the event insurance
- Wasted costs orders
- The effect of acceptance of Part 36 offers
- Security for costs
- Costs order against third parties

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