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Debbie Burke ~ Editor

will bring up to the minute information about costs to your desk - for free!! Look out for our e-mails headed "Costs Recovery News Update". As

always, we look forward to receiving your feedback for this new free service. Until then, may you and your business prosper.



Recent Cases...

Solicitors' Act Assessments - Always a trap for the unwary

In the case of *Allen v Colman Coyle Llp*⁽¹⁾, the client had challenged thirteen bills totalling more than £48,000.00 which had been rendered to him by his former solicitors. On detailed assessment, the total claimed was reduced by approximately 14%.

The parties then turned their attention to the costs of the detailed assessment. Section 70(9) of the Solicitors' Act 1974 provides that where the costs have been reduced by less than 20%, the client should pay the solicitor's costs of detailed assessment unless there are "special circumstances".

The client's new solicitor said that special circumstances did exist - Colman Coyle had refused to enter into any dialogue or discussions, had failed to hand over papers to enable the new solicitor to advise the client and had refused to engage in mediation. The client relied on the case of *Halsey v Milton Keynes General NHS Trust*⁽²⁾ as authority for departing from the usual order for costs where one party had refused to negotiate.

The client went even further and submitted that his own costs of the detailed assessment (which his new solicitor quantified at more than £29,000.00!) should be paid by Colman Coyle.

Colman Coyle argued that a refusal to mediate could not constitute a special circumstance and reminded the court that the lay client had failed to make any offer of settlement. The former solicitors said that there was no chance of any mediation succeeding and that because the costs of mediation would have been at least £10,000.00, it was likely that the firm would have faced unrecoverable costs. Colman Coyle maintained that their former client had not shown that they had acted unreasonably in refusing to agree to mediation.

In his judgment, Master Simons agreed with the client that the failure to engage in mediation or to attempt a settlement could amount to a special circumstance within the meaning of Section 70(10) of the Solicitors' Act 1974. Master Simons held that the finding of special circumstances gave him full discretion to decide what the appropriate order for the costs of detailed assessment should be. The former solicitors claimed costs of more than £20,000.00. Master Simons reduced these costs to approximately £11,400.00 and awarded the former solicitors two thirds of that sum. He did, however, refute the idea that there should be any costs orders in the client's favour.

Ref 1: [2007] EWHC 90075 (Costs)

Ref 2: [2004] EWCA (Civ) 576

Well, summer is behind us and the autumn looms. Despite the summer recess, the courts have continued to be busy with costs cases and there has been no let up in the number of cases arising from technical challenges to pre November 2005 cfa's. A number of those decisions are covered in this edition of **Costs Recovery News**.

Also covered in this issue is the Douglas Tribe case which deals with proportionality (as well as other issues). My experience over the last couple of years has been that global proportionality challenges are not terribly likely to succeed and even where there is an initial decision that costs appear disproportionate, so that the Lownds test of "necessity" kicks in, often the rest of the detailed assessment is largely unaffected by the initial finding that the costs appear to be disproportionate.

For anyone who carries out legal aid work, there still seems to be so much uncertainty about the way in which the new system will work in practice - this continuing uncertainty presents a real challenge to both practitioners and costs draftsmen alike. It is, of course, very much a case of having to wait and see but we will bring you an update in the next edition of **Costs Recovery News**.

Lastly, a reminder for all our subscribers to **Costs Recovery News**, that our new costs update service is about to go live and



Recent Cases...

Myatt and Garrett - where are we now?

The cfa Regulations 2000 might have been revoked in November 2005, but there are still a number of cases going through the courts where the enforceability of pre November 2005 cfa's is being challenged. It is important to remember that the 2000 Regulations still apply if the cfa was entered into before 1st November 2005.

In *Shaun Bevan v Power Panels Electrical Systems Limited*⁽¹⁾ the Defendant maintained that the cfa was unenforceable because the Claimant's solicitors had failed to advise the Claimant that they had a financial interest in recommending a particular insurance policy and they had asked a question about the availability of insurance which was not specific enough because there was no reference to credit cards, motor insurance or household insurance.

Mr Bevan's solicitors had indicated in their cfa that they were approved solicitors on the panel of Accident Advice Helpline. The Defendant argued that this did not convey to the client that the solicitors had a financial interest in recommending the insurance policy. Counsel for the Claimant acknowledged that there had been a technical breach of the Regulations but argued that oral advice was also given which did fully discharge the requirement with the result that the breach was not "material" as per *Hollins v Russell*⁽²⁾.

Master Wright, sitting as a Deputy District Judge, was satisfied that the Claimant had been given oral advice that did disclose the solicitors' interest and he then went on to consider whether the fact that the fuller explanation was not in writing amounted to a material breach of the Regulations. He found that there had been a materially adverse effect on the protection afforded to the client and a materially adverse effect on the administration of justice **because express**

provisions relating to the steps to be taken in litigious matters should be observed.

Dealing with the *Myatt* challenge, the Claimant's counsel relied on the fact that by asking a very "bland" question "Have you got insurance", the fee earner had asked the question in such a way as to minimise the possibility of the fee earner failing to identify available legal expenses insurance. The Defendant disagreed and argued that the Claimant should have been asked not simply whether he had any insurance at all, but whether, more specifically, he had credit cards, motor insurance or household insurance. Master Wright agreed with the Defendant and found that this, too amounted to a material breach of the Regulations.

In the circumstances the cfa was held to be unenforceable.

Mohammed Akram Kashmiri v Humayun Ejaz and Akbar Ejaz⁽³⁾ also raised an issue as to the enforceability of a cfa and again the *Myatt* and *Garrett* decisions were considered. The Claimant claimed for the cost of repairs and dilapidations at the end of the Defendants' lease of business premises. The action was compromised and the claim was discontinued with the Claimant paying the Defendants' costs of the action. The Defendants' bill totalled £60,670.87.

The Claimant argued that the cfa was unenforceable because the Defendants had not taken the required steps to investigate the BTE position - the Claimant's solicitors had merely indicated in a handwritten note on the cfa that the client was investigating the position with regard to pre-event insurance.

Costs Judge Master Simons found that there were differences between this case and the case of *Myatt*, not only because

the Defendants were sophisticated businessmen who would **know instantly whether or not legal expense insurance cover is in place**, but also because the solicitors had spent some 5 hours discussing the claim and the issue of insurance whereas in *Myatt* only a telephone call had been made to the Claimant, to discuss the availability of other forms of funding.

In the circumstances therefore Master Simons found that Regulation 4(2)(c) had been complied with and the cfa was enforceable.

Master Simons also heard the case of *Brian Foord v America Airlines Inc*⁽⁴⁾ where yet again, a preliminary point was taken that the cfa was unenforceable. Mr Foord's cfa again indicated that the Claimant's solicitors were an approved member of the Lawcall Direct Limited's solicitors' panel, but confirmed that the solicitors did not have any financial interest in recommending a particular insurance policy. The Claimant's solicitors filed witness evidence which argued that the firm had declared that it had a financial interest in Lawcall by stating that it was an approved member of Lawcall Direct Limited's solicitors panel.

The Defendant raised every possible argument, including:

- 1) that membership of the panel amounted to an ongoing commercial venture with Lawcall in contrast to the additional information given in the client care letter which gave the impression that this was a one off transaction for which a fee was paid;
- 2) that there was no need to show an obligation to recommend insurance because the claims management company and the solicitor had entered



Recent Cases...

into a collaborative venture, even though the insurance product was not recommended in every case; and
3) that it was not necessary to find a dependency on referrals for there to be a breach of the Regulations.

Witness evidence from the senior partner (both written and oral) dealt in detail with the client care information given to the client, the relationship between Lawcall and the firm, the percentage of cases referred by Lawcall and the number of those where the client had taken out Lawcall's branded ATE insurance compared to the number where this had not happened.

In his judgment, Master Simons said that the unchallenged evidence of the senior partner was that he recommended the insurance, that it was an appropriate policy in this case, that it was a policy with which he was familiar and which he considered sufficient and that he had disclosed the interest that his firm was on the panel of solicitors operated by Lawcall. He had gone further and also informed the client that his firm had a commercial arrangement with Lawcall and that for payment of a fee, Lawcall referred cases to the firm. Master Simons could not envisage what other disclosure the solicitors could have made. The firm had no financial interest in recommending the particular insurance with Lawcall and it was the unchallenged evidence of the senior partner that there was no obligation upon him to recommend the policy. As a result, all elements of the solicitors' financial interest with Lawcall were disclosed to the client either in the cfa itself or in the client care letter. Master Simons concluded that there had been no breach of Regulation 4(2)(e).

The case of *Tammy Preece v Caerphilly County Borough Council*⁽⁵⁾ was heard in the Cardiff County Court and was an appeal from an order made by District Judge Marshall Phillips. HHJ Hickinbottom found that a cfa was unenforceable

because the solicitors had failed to sign it. On the face of it, this seems to be a fairly harsh decision; the cfa was signed by the client and there was a copy letter from the Claimant's solicitors dated 6th November 2002 which stated **On 30th October 2002 we signed a conditional fee agreement**. The letter went on to explain some particularly important features of the cfa. Unfortunately, no signed version of the letter was produced to the court, nor was there a copy of the cfa signed by the solicitors.

HHJ Hickinbottom accepted that the cfa was not signed by the solicitors **by virtue of an entirely innocent mistake**, but having delivered a lengthy judgment which considered the relevant regulations and case law pertaining to the enforceability of cfa's, the judge concluded that **Parliament has clearly and unambiguously required a number of formalities to be undertaken with regard to the cfa, including that it be signed by the relevant legal representative**.

A bumpy landing . . .

There are a number of cases which all costs draftsmen learn at their mother's knee, *Brush v Bower Cotton and Bower*; *Hollins and Russell*; *Various Claimants v TUI UK Ltd*. Most of these cases deal with more than one aspect of costs and are quoted as often by receiving parties to defend a claim for costs as by paying parties to oppose one. *Douglas Tribe and Southdown Gliding Club Ltd*⁽¹⁾ looks set to become another such a case. Heard before Master Gordon-Saker in the Supreme Court Costs Office in June 2007, it deals with costs estimates, hourly rates and proportionality.

Mr. Tribe had suffered severe multiple injuries in July 2000 when a glider he was piloting nose-dived into the ground immediately after a winch launch. An investigation into the cause of the accident by the British Gliding Association

In this case, the cfa is deficient in those formalities and is therefore unenforceable.

These cases are, of course, noteworthy in their own right. The need to observe the express provisions relating to cfa's is reinforced but there seems to be a more flexible approach to the issues raised by *Myatt* and *Garrett*. It is also worth mentioning that the giving of written and oral evidence to support the validity of a cfa during the course of a detailed assessment is becoming all too common - something that cannot, surely, have been envisaged when cfa's were first introduced.

1. Ref: *Shaun Bevan v Power Panels Electrical Systems Limited* [2007] EWHC 90073 (COSTS) (SCCO)

2. Ref: *Hollins-v-Russell* [2003] EWCA Civ 974

3. Ref: *Mohammed Akram Kashmiri v Humayun Ejaz (1) and Akbar Ejaz (2)* [2007] EWHC 90074 (COSTS) (SCCO)

4. Ref: *Brian Foord v America Airlines Inc* [2007] EWHC 90076 (COSTS) (SCCO)

5. Ref: *Tammy Preece v Caerphilly County Borough Council: CC (Cardiff)* (Judge Hickinbottom): 15 August 2007

concluded that the automatic rear elevated control coupling had failed because it was incorrectly adjusted and worn. Mr. Tribe issued proceedings in July 2003 for damages for negligence against the hirer of the glider, the owner of the glider and Mr. King who had been responsible for inspecting the glider and had helped to maintain it. Mr. Tribe funded the litigation by way of a CFA supported by an ATE policy with cover limited to £100,000.00.

Allocation Questionnaires were filed in November 2003, and the First and Third Defendants' solicitors estimated their costs to be in the region of £7,500.00 with the Second Defendant's solicitors estimating their costs at £15,000.00 plus VAT.

Continued on Page 4

On 30th September 2005 Mr. Tribe served a Notice of Discontinuance, as a consequence of which the three Defendants were entitled to claim their reasonable costs from the Claimant. The bill of costs of the First and Third Defendants totalled £244,509.72, some five times more than the amount estimated in their Allocation Questionnaire. The Claimant's case was that he had relied on the estimate given and in particular, that he had not increased the level of his insurance premium as a result. He maintained that the costs allowed should be limited by reference to the costs estimate in the Allocation Questionnaire.

The matter was listed for a preliminary hearing in the SCCO to determine four issues:-

- (1) Whether the costs claimed by the First and Third Defendants should be limited to the sums estimated in the Allocation Questionnaire
- (2) What effect if any should the estimate have on the claim for costs
- (3) Whether the costs claimed were disproportionate
- (4) The amounts that should be allowed for the solicitor's hourly rate

Unfortunately for Mr. Tribe, shortly before the hearing, his solicitors came off the record leaving Mr. Tribe as a litigant in person.

Master Gordon-Saker looked at Section 6 of the Costs Practice Direction and the case of *Leigh v Michelin Tyres plc*⁽²⁾, and in a detailed judgment reached the following conclusions:-

- The Claimant had reasonably relied upon the estimate given by the First and Third Defendants in their Allocation Questionnaire and that it was an appropriate case to reduce the Defendants' costs to take into account the Claimant's reliance on the estimate.

- That the costs claimed were disproportionate to the value and issues of the action particularly because there were no complex legal issues.

- It was reasonable for the Defendants to instruct specialist aviation solicitors,

but this was not "City" work and the Defendants should only be able to recover Central London rates, anything more would be unreasonable.

1. Ref: *Douglas Tribe v (1) Southdown Gliding Club Ltd (2) Robert Adam (3) Estate of Ron King (2007) - SCCO*

2. Ref: *Leigh v Michelin Tyres plc [2004] 1 WLR 846: [2003] EWCA Civ 1766*



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Cases in Brief...

Ask first or repent at leisure

The Appellant firm was approached by the Respondent to act for her in divorce/family proceedings. The Respondent indicated that she would be borrowing money from her parents to pay her costs, but she also informed her solicitor that a company which she owned jointly with her husband had dividends of £100,000.00 per year, although she had no knowledge about the company's finances. The Respondent also said that her salary of £4,000.00 had not been paid.

The Respondent's father had queried the possibility of the Respondent being eligible for public funding three weeks after his daughter had instructed her solicitors to commence proceedings. He was told that the firm did not undertake legal aid work but that the Respondent could be referred onto another firm that did. The Respondent eventually transferred her instructions to other solicitors where she was immediately granted public funding.

The Appellant firm subsequently brought a claim against the Respondent for

£21,000.00 in respect of their professional fees. The Respondent denied that she was liable for the fees and counter-claimed for the repayment of £9,000.00 she had already paid on account, alleging that amongst other things, the Appellant firm had been negligent in failing to advise her as to her eligibility for public funding.

The Appellant firm argued that a solicitor was entitled to a period of time during which certain investigations in relation to the contemplated proceedings could be carried out and only then should they consider their client's position with regard to eligibility for public funding. The Court of Appeal disagreed and held that **a solicitor must be bound at the outset to consider the question whether a client might be eligible for legal aid.** As a result, the appeal was dismissed and judgment was given on the Respondent's counter-claim save for a small amount relating to a specific item of costs.

Ref: David Truex, Solicitor (A firm) and Simone Kitchin [2007] EWCA Civ 618

Departing from the general rule

In this Appeal against a decision made by HHJ Seymour Q.C, the provisions of CPR 48.1 were considered. Rule 48 deals with applications for pre-action disclosure and Rule 48.1 provides that as a general rule the court will award costs to the person against whom the order for pre-action disclosure is sought. There is also the usual caveat that the court may make a different order, having regard to all the circumstances.

In this particular instance, SES harboured suspicions surrounding the manner in which a contract had been obtained from UK Coal PLC. SES also suspected that an employer had been colluding with UK Coal Plc with a view to stealing business from SES. On 23rd November 2006, SES made an application for pre-action disclosure. At the end of the hearing HHJ Seymour had directed that UK Coal Plc should pay the costs of the application because of the way in which

it had defended the application. Specifically, that it had unreasonably **sought to create a position... in which the Applicants [SES] were confronted by a wall of witness statements, which looked impressive and intimidating,** but UK Coal Plc failed to produce any of the documents sought.

Counsel for UK Coal submitted that HHJ Seymour had gone too far in directing that it should pay the costs of the application. The Court of Appeal agreed and ruled that the judge's exercise of discretion was flawed. Whilst it was felt that the criticisms made by HHJ Seymour were well-founded and there were grounds for departing from the general rule, to order UK Coal to pay the costs of the application was going too far, and the Court of Appeal substituted no order as to costs.

Ref: SES Contracting Limited and UK Coal PLC and others [2007] EWCA Civ 791

Come and join in my party!

Within existing proceedings, the Claimant alleged that a non party [O] had funded, benefited from and been the controlling mind of the defence, and on this basis the Claimant sought to join O to the action and an order that O pay costs incurred previously. The application was made under CPR 48.2.

The Court considered first of all, the correct response to an application to join a non-party and the relevant case law. Counsel for O maintained that there had been a considerable delay in bringing the application, but, whilst the court agreed that there had been a measure of delay, it did not feel that O had been unduly prejudiced by same. On this basis, the application was not an abuse of process, and an order was made joining O as a party to the proceedings.

The court then considered whether a costs order could immediately be made against O. The court was particularly concerned at the time and expense that had already been incurred (the costs in issue were only in the region of £46,000.00).

However, having considered the relevant case law the court concluded, with some regret, that it could not decide to take the exceptional step to convert the current hearing into a substantive hearing, because that would be unfair to the Claimant which had had no reason to prepare and present its full case on the substantive issues. Having joined O to the proceedings, there was no alternative but to allocate a further hearing to deal with the issue of the costs sought from O.

Ref: PR Records Ltd. v Vinyl 2000 Ltd and another [2007] EWHC 1721 (Ch)



Cases in Brief...

Putting your foot in it?

In this case⁽¹⁾, a dispute had arisen with regard to the payment of invoices relating to cleansing and disinfecting work carried out by the Claimant following the foot and mouth outbreak in February 2001. In June 2005, by consent, the Defendant agreed to pay the Claimant £11,350,450.35 in full and final settlement of its claims. The order also provided for the Defendant to pay the Claimant's costs **including the (Claimant's) reasonable internal costs.**

The Claimant's bill of costs exceeded £1.2 million of which £655,374.37 was claimed for the "internal" costs of a Quantity Surveying Team and this amount was disputed by the Defendant.

In January 2007, Master Campbell concluded that the Claimant could only recover internal costs of an expert nature in accordance with the judgment in *Nossen's Letter Patent*⁽²⁾. (If expert assistance was required in litigation and the most suitable experts were the party's own employees, the direct costs of obtaining that evidence were recoverable). Master Campbell proceeded to set the hourly rates for three employees from the Claimant's Quantity Surveying Team but the Claimant then appealed.

It was common ground that the issue in dispute was the interpretation of the June 2005 order. The Defendant's counsel submitted that the word "reasonable", in addition to its accepted meaning, must also mean "recoverable at law", whilst

the Claimant's counsel maintained that the word "reasonable" related to all the costs and that therefore the Claimant's internal costs were included.

Mr. Justice Griffith Williams found that there are no grounds for applying [to the word reasonable] the strained interpretation of the Defendant's counsel and concluded that **reasonable is a word in common use; its ordinary and natural meaning is as defined in the Shorter Oxford Dictionary** and it was a matter for the Master during the course of the detailed assessment to determine whether the costs of the quantity surveying work were reasonably incurred and reasonably in amount.

1. Ref: *Ruttle Plant Hire Ltd v Department of the Environment Food & Rural Affairs* (2007) [2007] EWHC 1633 (QB)

2. Ref: *Nossen's Letter Patent* [1969] 1 WLR 638



Watch this Space

Legal aid reforms

Typing "law society legal aid reforms" into Google brings up more than two million hits and it's not even October yet! We will look in more detail at the latest reforms in the next edition of *Costs Recovery News*, but if any readers have any particular matter which they would like to see feature as an article, please do not hesitate to contact us. Until then, good luck to all family practitioners who will be grappling with the new system.....



Useful Information...

LSC - Rates in Placement Proceedings

If the application for a placement order is being heard at the same time as care proceedings and is therefore "related proceedings" for the purposes of a non means, non merits tested certificate, then in accordance with Regulation 3(2)(a) of the Legal Aid in Family Proceedings (Remuneration) Regulations 1991 the proceedings will be remunerated at the "care" rate because the Regulation refers to the work for which the certificate was issued.

However, where the application for a placement order is issued on a free-standing basis then the civil rates will apply except where the proceedings are taking place in the Family Proceedings Court. In the Family Proceedings Court, Regulation 104 of the Civil Legal Aid (General) Regulations 1989 (as amended) requires these to be paid as family proceedings. As the proceedings are not care proceedings, Schedule 2(b) will apply.

LSC - Claiming the cost of bill preparation in prescribed family proceedings

Schedule 2A of the Legal Aid in Family Proceedings Regulations 1991 provides an allowance for preparing a bill of costs in the High Court and County Court. There is no allowance for bill preparation in prescribed family proceedings held in the Magistrates' Court.

However, the Legal Aid in Family Proceedings (Remuneration) (Amendment) Regulations 2007 have introduced equalised rates for County Court and Magistrates' Court proceedings. The new rates apply when the funding certificate is granted on or after 2nd April 2007. The harmonised rates provide an allowance for preparing a bill of costs and therefore this now applies to private law family cases in the Magistrates' Court. Some good news at last!