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The Bi-Monthly Newsletter from Deborah Burke Costing Limited ~ Law Costs Draftsmen and Consultants

Debbie Burke ~ *Editor*

WELCOME to the first issue of the New Year of ***Costs Recovery News*** and especially to the many of you receiving it for the first time. We know from all the positive feedback which we have received that ***Costs Recovery News*** satisfies a need for invaluable information in the area of costs, delivered in a concise form, and which is hard to come by elsewhere.

To all those who told us that each edition should be bigger, thank you. You were absolutely right and as you can see from the articles overleaf, there has never been a more important time for keeping up to date with costs matters.

Looking back over the past year I have been struck by the fact that so much of what we have covered in our publication reflects the common perception that the introduction of the Civil Procedure Rules in 1999 has been a largely successful exercise with the exception of the thorny issue of costs. That is ironic, because however good the lawyer, however difficult the case and/or the client, if a case does not make a profit, the lawyer has failed in the broadest sense.

Now that the dust has settled a little following the judgment in the case of ***Garbutt v Edwards,*** we are left with more questions than answers - Why should the solicitor who provides a costs estimate which is inaccurate be in a worse position than one who fails to provide any estimate at all? How do we reconcile this decision with that of ***Wong v Vizards*** where the solicitor's charges were capped at the estimate plus 15%?

There have been several references in recent cases to lay clients operating in a risk free environment, but the same cannot be said for the lawyers who represent them. The continuing barrage of technical challenges, primarily to conditional fee agreements entered into before November 2005, makes the area of costs recovery a minefield.

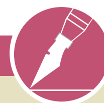
To this must also be added the requirement for costs to be reasonable and proportionate, with the need to demonstrate effective assessment and management of every case, using appropriate delegation wherever possible and being ever mindful of the costs as they increase.

However, all is not lost and if nothing else, the recent raft of cases should have focused the attention of all of us on the importance of maximising recovery and profit.

For fee earners the emphasis must be on good file management skills coupled with access to up to date relevant information on costs. The purpose of our seminar on Thursday 23rd March 2006 is to help you to achieve those goals (details enclosed). We will deliver relevant information to improve your effectiveness and profitability as a fee earner - you will not be disappointed!

If you are sending files to us for costing, why not complete one of our "pro-forma" instruction sheets (details overleaf). Even better, why not delegate that task to your support staff to allow you to carry on with fee earning work? If you are in the Midlands, you will also be able to take advantage of our free courier service.

As always, please continue to give us your feedback. Your thoughts and ideas are invaluable.



Cases in Brief...

Myatt & Others v National Coal Board

THE Court held that it was not sufficient to rely on the client's instructions concerning other methods of funding.

Ref: [2005] EWHC 90012 (Costs)

Garrett v Halton Borough Council

THE failure to advise a client that there were other insurance policies available in a case where the solicitor had an indirect interest in the policy meant that the regulations had not been complied with and that the conditional fee agreement was unenforceable. Permission to appeal to the Court of Appeal has been granted. If the decision is upheld, many lawers will lose out but if the decision is overturned the position of claims management companies will be strengthened and it will be interesting to look at the decision of the Court of Appeal in the light of the newly published Compensation Bill, which will deal with the regulation of the claims management companies.

Ref: Liverpool County Court, HHJ Stewart, 5th April 2005

Reid v Capita Group

EMPHASISES the dangers of commencing proceedings in the absence of a letter before action.

Ref: [2005] EWHC 2448 (Ch)

Codent Ltd v Lyson Ltd

THE approach adopted by the court in Trustees of Stokes Pension Fund (Issue 2 of ***Costs Recovery News***) was approved in this case where the Defendant made a late offer which substantially exceeded the amount recovered at trial.

Ref: Court of Appeal, 8th December 2005

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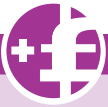


Profit Pointers...

Instructing a Costs Draftsman

THERE'S nothing complicated about instructing a Costs Draftsman, or is there?

Not all files will require the assistance of a costs draftsman, but even in a modest claim it will usually be more effective for the fee earner to use the services of a costs draftsman, the hourly rate of whom will almost always be lower than that of the fee earner, who will then be able to continue with chargeable work on current cases.

Once the decision to instruct a costs draftsman has been taken, the quicker the instruction takes place, the better. The fee earner should ensure that the file is ready for dispatch to the costs draftsman as soon as the authority for detailed assessment arrives. If the court order does not arrive immediately, this need not delay the file being sent as long as the costs draftsman is made aware of any relevant costs provisions. Up-to-date ledger and time recording printouts and disbursement vouchers should accompany the file, together with the pleadings. The fee earner will also need to provide specific instructions on other matters such as the involvement of previous solicitors, estimating time, previous partial costing of the file and whether an enhanced hourly rate is to be claimed.

This is an important task and different costs draftsmen will have their own procedures for collating all of the necessary information. To minimise the fee earner's loss of chargeable time, *Deborah Burke Costing Ltd* have devised a pro forma instruction sheet (available by e-mail on request) to enable our clients to provide us with all of the required information in the minimum possible time. It also makes it possible for support staff to undertake this task with minimal input from the fee earner.

Recent Cases...

Hello, Hello, What's all this then? One for the Defendants

THE Claimant was a serving police officer who was injured when she was thrown from her police horse. She claimed negligence, and damages were agreed at £7,000.00, subject to liability. The Claimant failed on liability at trial.

The total costs of both sides were just short of £50,000.00 and the Defendant sought costs from the Claimant. The Claimant argued unsuccessfully at the end of the trial that there should be a departure from the general rule that costs follow the event, because the Claimant's Part 36 offers had been rejected by the Defendant and the Defendant had refused to negotiate.

The Claimant appealed against the trial judge's decision to award costs against her. Lord Justice Dyson said: "I do not see how an unsuccessful claimant can show that a successful defendant acted unreasonably simply on the grounds that he refused to accept the Part 36 offer" [paragraph 25]. He went on to say that "It seems to me to be entirely reasonable for a defendant, especially a public body such as the police, to take the view that it will contest what it reasonably considers to be an unfounded claim in order to deter other, similarly unfounded claims."

The issue of unreasonable conduct, which inevitably depends on the circumstances of the case, was seen to be central and this case resonates with the case of The Wethered Estate Ltd which we looked at in Issue 3 of ***Costs Recovery News.***

Ref: Fiona Jane Daniels v
The Commissioner of Police for the Metropolis
[2005] EWCA Civ 1312

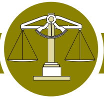
Gone but not forgotten

THE Claimant's original claim arising out of an RTA in January 2001 had been brought under The Accident Group Scheme (TAG). The Defendant argued that there had been a breach of Regulation 4 of the Conditional Fee Agreements Regulations 2000. The Claimant maintained that to raise this compliance issue was an abuse of process because there had been a successful mediation of the compliance issue. Unfortunately, the liability insurer in this particular case [Churchill] had not been a party to the mediation, which was in any event confidential, and it contended that even if it had participated in the mediation, it did not necessarily mean that it would have agreed to the terms upon which the same was concluded.

Master Hurst found that, whilst it was "extremely regrettable that this issue continued to be raised, there has been a clear breach of regulation 4(2)(c) in that the Claimant was never asked to produce his motor policy. ... I am satisfied that the protection afforded to the client has been adversely affected in the present case. ... These findings mean that the CFA is unenforceable and accordingly, nothing is recoverable under it."

In addition, because the Claimant had in force a DAS BTE policy under which he had already made one claim, the Senior Costs Judge found that it was unreasonable and disproportionate to have taken out the TAG policy, and that the ATE premium was also not recoverable.

Ref: Paul Richards and William M Davis
(SCCO Ref: PTH 0504722)
www.hmcourts-service.gov.uk/judgmentsfiles



Recent Cases...

With regret but that is the law

NAOMI Campbell is in the news again, but this time it is her lawyers who have grabbed the headlines. In relation to the original trial and the Court of Appeal, Ms Campbell's Solicitors acted under an ordinary retainer. However, when the matter went to the House of Lords, the matter was conducted under a CFA with success fees of 95% for the solicitors and 100% for counsel.

As a result, in a case where damages were awarded of £3,500.00, the Defendant was presented with three bills of costs totalling £1,086,295.47, of which the success fee for the work in the House of Lords represented £279,981.35.

The Defendant argued that it should not be liable to pay any part of the success fee, because such a liability is so disproportionate as to infringe its right to freedom of expression [paragraph 6]. The Defendant's argument failed, but it is clear from the judgment that the Law Lords were not comfortable with the situation.

Lord Carswell states at paragraph 57 "My conclusion accordingly has to be clear, though I do not reach it without regret. While I am far from convinced about the wisdom or justice of the CFA system as it is presently constituted, it has to be accepted as legislative policy."

This judgment was delivered before the detailed assessment of costs in the libel case of ***Musa King v Telegraph Group.*** Again high success fees of 95% for solicitors and 67% for counsel were allowed, but the hourly rate claimed by the Claimant's solicitors Carter-Ruck was reduced from £375.00 per hour to £325.00. Overall approximately one-third was knocked off the Claimant's costs (which were originally

claimed at around £900,000.00). Carter-Ruck was quick to point out that the reduction in costs was largely due to the rulings on hourly rates and proportionality, rather than because the time spent had been significantly reduced.

The judgment does, however, represent a shot across the bows to City solicitors by saying that it is unreasonable and disproportionate to charge City rates for work which could be competently handled by other firms. The importance of meaningful delegation to junior fee earners and the use of only one counsel was also stressed.

Ref: Campbell v MGN Ltd [2005] UKHL 61

Ref: King v Telegraph Group Ltd (SCCO Ref: PTH 0408205 and 0408206)

www.lawtel.com

www.lawgazette.co.uk

[Gazette 16th December 2005]

Guidance on guideline rates

THE order made in August 2005 in the case of the Claimants set out in Schedule 1 to the Order of the Senior Master dated January 17, 2005 v (1) TUI UK Ltd (2) Thomas Cook Tour Operators and others (SCCO) [now more usually referred to as Various Claimants v Thomas Cook] dealt with the quantification of a cap for costs in a group litigation matter.

In calculating the cap, the Senior Costs Judge, Master Hurst, expressed his concern that the costs in group actions were spiralling out of control. In his judgment, Master Hurst took the opportunity to comment on the Guideline Hourly Rates for Summary Assessment saying that they were just that, guidelines. He also said that the guideline rates do contain an element for care and conduct, but that the precise percentage is not ascertainable.

This contrasts with the position in 1999 when the Guideline Rates which were first published did include a 50% uplift for care and conduct.

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Useful Information...

Deemed costs orders

RULE 44.13 of the Civil Procedure Rules has been amended to clarify the position where it is common practice for an order to be silent on the subject of costs.

Rule 44.13 (1A) specifically provides that when an order is made which grants permission to appeal, or to apply for judicial review or any other order of direction following an application without notice, the order will be deemed to include an order for the applicant's costs in the case

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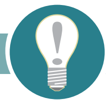

Useful Information...

Guidance on VAT and overseas clients

FURTHER to the articles in Issues 2 and 3 of ***Costs Recovery News,*** revised guidance on the application of VAT to legal work done for asylum seekers and other overseas clients has now been published. The full guidance can be found in issue 49 of Focus (December 2005) and should be read by all, not just those engaged in asylum and immigration work. The revised guidance confirms that past charges already claimed from the Legal Services Commission do not need to be amended if VAT was incorrectly dealt with. The position may be different where there was a private retainer or where inter partes costs have been paid.

Ref: Focus December 2005 (Issue 49)

CFAs - do not forget!

DON'T forget that the new CFA Regulations which came into force on 1st November 2005 (see Issue 3 of ***Costs Recovery News***) are not retrospective. Any CFAs signed before 1st November 2005 are still governed by the old regulations. The Law Society's website at www.lawsociety.org.uk/professional/conduct/guidance has some useful guidance on the new regime, together with links to other useful documents. www.dca.gov.uk/confeeagr/faqs/htm has a list of FAQs.

Regional Costs Judges

FOLLOWING hot on the heels of the pilot scheme for assessment of costs in London County Courts by the Supreme Court Costs Office becoming permanent (see Issue 1 of ***Costs Recovery News),*** with effect from 14th November 2005, Regional Costs Judges have been appointed in each region of HM Court Service outside London.

Following a direction from a District Judge in the court in which a bill of costs has been lodged, the Regional Costs Judge will be able to carry out the detailed assessment in specified circumstances, where:-

- The estimated length of the detailed assessment exceeds one day; and/or
- The total amount claimed in the bill of costs exceeds £50,000.00; and/or
- Complex arguments on points of law or an issue affecting a group of similar cases are identified in the Points of Dispute or Reply or are referred to in argument at an assessment hearing.

The allocation of cases to a Regional Costs Judge is, however, a judicial decision, it is not automatic and on the information presently available, it is difficult to know how many bills will actually be dealt with by Regional Costs Judges.

Nothing in the new scheme prevents the transfer of a detailed assessment to the Supreme Court Costs Office in accordance with the provisions of the Civil Procedure Rules.

The maximum fee principle

WITH the exception of care proceedings, don't forget that if counsel is instructed in the magistrates' court and prior authority to instruct counsel has not been obtained, the "maximum fee principle" applies. The result is often a draconian reduction both to counsel's fees and to the solicitor's profit costs.

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