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costs recovery

The Bi-Monthly Newsletter from **DEBORAH BURKE COSTING LIMITED** ~ Law Costs Draftsmen and Consultants



Debbie Burke ~ Editor

WELL, time has certainly flown since our January edition, but events in the world of solicitors' costs move on apace.

On a personal level, I have recently been elected on to the Council of the Association of Law Costs Draftsmen, and at my first meeting, we spent some time looking at the Civil Justice Council's proposals in relation to Part 36 offers and payments (see the article overleaf). The Civil Justice Council's consultation paper "Improved Access to Justice - Funding Options and Proportionate Costs" is currently being debated and surprise, surprise, it recommends a substantial extension to the predictable costs regime. I am sure that I am not alone in detecting a determination for this regime to be seen to be successful. The case of **Nizami v Butt** seems to indicate that the Indemnity Principle can be brushed aside when the costs fall within the predictable costs regime. By contrast, woe betide the lawyer who falls foul of the conditional fee agreement regulations, often with the result that all costs are lost.

In this edition of **Costs Recovery News**, we've concentrated particularly on Part 36 offers and payments. If you would like to see other costs topics dealt with in similar depth in future editions of **Costs Recovery News**, please contact me.

Our CPD accredited costs seminar on 18th May 2006 in Birmingham will provide fee earners with an ideal

opportunity to explore in detail the practical implications of many of the significant developments in the field of costs recovery. Please see the enclosed flyer for further information.

In keeping with our business philosophy, we are considering making future editions of **Costs Recovery News** available by e-mail. If you would like to take advantage of this facility, please contact Maria Jenkinson maria@dbcosting.co.uk to register your interest. Similarly, if other members of your practice do not currently receive a copy of this publication and would like to do so, please contact Maria with their details so that we can add them to our database.

All of us at Deborah Burke Costing Limited are delighted to welcome our many new clients. They are now benefiting from our high quality costing service and speedy turnaround of files. Sending us your files will help you to improve your costs recovery significantly.

Finally, we would like to introduce you to some of our sponsors whose advertisements appear in this issue. Boffins Computer Workshops have and continue to be invaluable to our business in setting up and maintaining for us an excellent state-of-the-art computer network. Kaufmans Legal Secretarial Services Ltd have provided us with a number of high calibre legal secretarial staff. Fully Focused provide marketing solutions to both large and small businesses with an emphasis on building and maintaining good business relationships. And if you like the look and feel of this publication and would be interested in providing something similar for your organisation, look no further than Laser Graphics, with their expertise in artwork, design and print production of high quality literature at affordable prices.

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



Watch this Space

Appeals to the Court of Appeal

THE appeals in the case of **Myatt & Others v National Coal Board** (featured in issue 4 of **Costs Recovery News**), which dealt with the failure of the solicitor to make enquiries in relation to before the event insurance, and the case of **Garrett v Halton BC** (in relation to the time at which the issue of a materially adverse effect is looked at), are both due to be heard by the Court of Appeal in June 2006. More later . . .

Ref: [2005] EWHC 90012 (Costs)

The Indemnity Principle - where has it gone?

IN the case of **Nizami v Butt**, referred to in a recent edition of the Law Society Gazette, the court confirmed that in relation to cases falling within the predictable costs regime, it was not possible to challenge disbursements (as opposed to the fixed profit costs) on the grounds of a breach of the Indemnity Principle, because the Indemnity Principle does not apply to the predictable costs regime.

Ref: [2006] EWHC159(QB)



Cases in Brief...

Assignment of a conditional fee agreement

THE case of **Jenkins v Young Bros** is an important one which confirms that in the particular circumstances of that litigation (the client had followed the fee earner from one firm to another), it was possible to assign the benefit of a conditional fee agreement to the successor firm.

Ref: [2006] EWHC151 (QB)

Backdating conditional fee agreements

TWO recent cases have considered the backdating of conditional fee agreements. In **Musa King v Telegraph Group** (see issue 4 of **Costs Recovery News**), the SCCO confirmed that it was possible to backdate a conditional fee agreement although no success fee would be allowed for the period of backdating. The case of **Holmes v Alfred McAlpine** also confirmed that a conditional fee agreement is enforceable despite backdating.

Ref: [2006] EWHC110 (QB)



Recent Cases...

Can a Part 36 offer be accepted after the final hearing has taken place?

THE Claimant claimed damages following an assault by a doorman at a nightclub owned by Luminar Leisure. The doorman had been supplied by ASE Security Services Ltd, which subsequently became insolvent. The Third Defendant was the insurer of ASE Security Services Ltd and had been joined to the action because of its potential interest in the outcome of the litigation.

On 16th and 17th November 2005, an appeal and cross-appeal arising out of the trial of preliminary issues on liability were heard and judgment was reserved.

Before the appeal hearing, both the First and Third Defendants made Part 36 offers to settle the outstanding appeals. On 17th November, the morning of the second day of the appeal, the First Defendant's solicitors made a new offer.

The Third Defendant's solicitors told the First Defendant's solicitors that their offer was rejected and indicated that the Third Defendant's offer was no longer available.

On 22nd November, after the hearing of the appeals was concluded and judgment had been reserved, the First

Defendant's solicitors wrote confirming acceptance of the offer previously made by the Third Defendant and applied for a stay of the appeal on the basis that a Part 36 offer had been made by the Third Defendant which had been accepted. The First Defendant submitted that Part 36 did not provide for a Part 36 offer to lapse, that the offer had never been rejected and that it was therefore still open for acceptance.

The Court of Appeal held that there had been an explicit withdrawal of the offer on 17th November, so that it was no longer available for acceptance. Secondly, the court found that the offer "carried an implied term that it would not be available for acceptance after the hearing ended and the court reserved judgment. By that stage the risks of the litigation might have altered very significantly and it would be inimical to the Part 36 regime if there was any scope within for a Part 36 offer to be [accepted] . . . after the appeal hearing was over and the court had embarked on considering its judgment." The First Defendant's application was dismissed.

Ref: David Philip Harvey v (1) Luminar Leisure Plc
(2) ASE Security Services Ltd (3) David Preston Mann
(as nominated underwriter for Farady Underwriting Ltd) (2006)
[2006] EWCA Civ 30

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Recent Cases...

Even after all these years

IN June 1996, on a warm evening in Frith Street, Soho, according to Lord Justice Longmore, Tarek Farag was arrested when he was showing jewellery to passers-by. Arising out of the arrest, Mr Farag issued proceedings for damages for wrongful arrest, false imprisonment, assault, etc. In July 1997, the Defendant made an offer to pay £3,001.00 to settle the matter. The offer had been withdrawn on or before 3rd May 2002.

At trial in October 2004, the Claimant won on one claim for assault, but the rest of his claims failed. The jury awarded damages of £1,465.00 and the Defendant was ordered to pay Mr Farag's costs. The costs order was appealed.

The Claimant argued that the Defendant's offer, made before the introduction of the Civil Procedure Rules in 1999, was not still open for acceptance after their introduction. The court found that this argument was "unrealistic."

In any event, it was decided that the judge was entitled to take the offer into account because the trial took place well after the introduction of the Civil Procedure Rules and was therefore

governed by CPR 44.3(4). The original costs order was struck out and an order for "no order for costs" was substituted.

Ref: Farag v Commissioner of Police for the Metropolis [2005] EWCA Civ 1814

What the law says goes

ON 18th March 2004, the Defendant offered £85,000.00 to the Claimant in settlement of a prospective claim arising from an alleged misrepresentation. The Claimant rejected the offer and issued proceedings. On 8th March 2005, the Defendant paid £85,000.00 into court, which was accepted by the Claimant. The Defendant then applied for an order that the Claimant should pay the costs incurred since March 2004 on the basis that if the first offer had been accepted, the costs of the proceedings, etc. would not have been incurred. The court extended the time period for making a Part 36 offer under CPR 36.10 (using CPR 3.1(2)(a)) and determined that it then automatically followed that the Claimant should pay the Defendant's costs from 18th March 2004. On appeal it was found that the court did not have the jurisdiction to deprive the Claimant of a mandatory costs order in its favour.

Ref: Walker Residential Ltd v Davis & Anor (2005) [full citation awaited]

Conditional fee agreement unenforceable

Jones v Caradon Catnic [2005] EWCA Civ 1821

The approved judgment is not yet available in this case which concerns a collective conditional fee agreement. The agreement itself provided that the success fee would be set out in the separate risk assessment but could not exceed 100%. In fact, the risk assessment provided for a success fee of 120%. The Court of Appeal held that there was no materially adverse effect on the client because on a true construction of the relevant documentation, there were no circumstances in which the client was liable for a success fee which was greater than 100%. However, because there were administration of justice issues and the breach was "more serious" than any of the breaches referred to in the leading case of **Hollins v Russell**, the collective conditional fee agreement was held to be unenforceable. Will this be used by paying parties? This contrasts considerably with the understandable concerns raised in the case of **Richards v Davies [2005] 25th November SCCO** where the client had been clearly materially adversely affected by the failure to identify and recommend a suitable funding method.

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Useful Information...

Challenges to Counsel's fees

WHENEVER Counsel's success fee is challenged where Counsel is acting under a conditional fee agreement, Section 20.4 of the Costs Practice Direction applies. It requires you to make contact with Counsel within three days of service of points of dispute and to send Counsel a copy of the points of dispute and the bill of costs. Counsel has ten days within which to accept the reduction sought or some other reduction and to state any points he wishes to make in the reply. If Counsel fails to inform the solicitor within ten days, Counsel will be taken to have accepted the reduction proposed unless the Court orders otherwise.

Costs estimates - Don't forget your own client

WE have looked previously at the new provisions relating to costs estimates in the revised Section 6 of the Costs Practice Direction.

Section 6.4 requires you to serve a copy of any estimates filed at court on your own client as well. The accuracy of costs estimates has never been more important, both in relation to the recovery of inter partes and of solicitor/client costs.

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All change for Part 36?

Although Part 36 has been effective in encouraging early resolution of disputes, some defendants have felt that the system is weighted towards claimants - although both parties can make an offer to settle, a defendant in a money claim must make a payment into court to support his offer to settle the claim. However, most sums paid into court under Part 36 are made by insured and public sector defendants and substantial sums can be tied up in court while litigation continues.

Two recent judgments of the Court of Appeal (one of which we have looked at before in **Costs Recovery News** - the Trustees of Stoke case) have led to the Department for Constitutional Affairs issuing a consultation paper, "Part 36 of the Civil Procedure Rules: Offers to settle and payments into court." The consultation paper puts forward five options, the objective of which is to remove the need for payments into court, whilst still protecting the interests of claimants. The consultation paper's preferred option will enable public bodies and insured parties to make Part 36 offers without the need

for an actual payment into court.

More on this as the consultation develops.

Ref: <http://www.dca.gov.uk/consult/civilproc36/cp0206.htm>

Section 48(8) - Notifying your client in advance

THIS rarely referred to section of the Civil Procedure Rules is, nevertheless, an important one. It requires you to notify your client in advance of any unusual items of costs which might not be recoverable from the paying party at the conclusion of the case. If you fail to do this, the costs will be presumed to have been unreasonably incurred as between the solicitor and his client.

Also beware this section being raised against you by a paying party, particularly where there have been "unusual" costs incurred. A smart paying party will ask you to confirm that you have advised your client about this expenditure. If you have not, the paying party will argue that there is no reason for your client's costs in this respect to be indemnified.

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