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costs recovery

## news



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

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Debbie Burke ~ Editor

BEFORE putting pen to paper to write this, our last editorial of 2006, I took a little time to look back at my first editorial of this year. I was not altogether surprised to find that the issues we highlighted in the January issue of **Costs Recovery News** - costs estimates, technical challenges to conditional fee agreements, proportionality - still feature heavily in this edition. The new cases we cover in this issue illustrate just how much discretion the courts have when making a costs order. No step can afford to be taken during the course of the case without the fee earner bearing in mind the potential cost consequences of that step.

We often concentrate on costs recovery in contentious work but of course the guiding principles of planning and assessing the case at every stage apply equally to non-contentious work. The article by **Victoria Hopkins**, who is a fellow costs draftsman and an assessor for the Law Society's Remuneration Committee, makes fascinating reading. There but for the grace of God.....

While going to press we have heard that permission to appeal has been refused by the House of Lords in the **Garrett** case. There is no news yet on the **Myatt**

appeal. We will assess the implications for solicitors and report in more detail in the next edition.

It only remains for me to wish all of our readers a Very Merry Christmas and a Happy and Prosperous New Year.

## Costs Recovery News - Important information

FROM JANUARY 2007, we will be moving to a quarterly e-mail only format for **Costs Recovery News**

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### Recent Cases...

## Winners and losers

THE Claimant firm of estate agents had discovered that a former employee had removed confidential information prior to her leaving to go to work for the Defendant. The Claimant sought undertakings from both the former employee and the Defendant for the return of the information. The Defendant initially failed to respond to the Claimant's request, although it subsequently reported that it had been investigating the matter. The Claimant issued injunction proceedings which were dismissed by consent on the Defendant giving the requested undertakings. The Judge directed that the former employee should pay the Claimant's costs and that the Claimant should pay the Defendant's costs of the application, because the same was premature, and that as there was no

evidence against the Defendant, the Claimant had failed in its action!

The Court of Appeal found that the judge had erred in principle in awarding the Defendant its costs. The question to be considered was whether, had the Defendant not given the undertakings sought prior to the hearing, the Claimant would have won on the application. The fact that the Defendant had given the undertakings showed that the Claimant would have won and that the application was a reasonable step to take, bearing in mind the fact that so far as the Claimant was concerned time was of the essence.

*Fox Gregory Ltd v Hamptons Group Ltd (2006)*

CA (Civ Div) 04.10.2006

[no neutral citation number as yet]



## Recent Cases...

# CFA Regulation 4 - still with us after all this time!

IN this decision, the tests referred to in **Garrett & Myatt** were instrumental in finding that Regulation 4 had been complied with.

The Claimant had suffered serious and complex injuries as a result of a motorcycle accident. The Claimant's first solicitors were DAS Panel Solicitors who had represented him under his DAS legal expenses insurance. The Claimant became dissatisfied with his solicitors and instructed Irwin Mitchell. At first, IM acted on a private client basis

but, on 8th January 2003, the Claimant entered into a CFA together with an ATE insurance policy. Damages were finally agreed on the second day of the trial in the sum of £1.6 million.

The claim for costs was served and the Points of Dispute raised questions of the legal expenses insurance policy and of compliance with Regulation 4. The replies accepted that there was a BTE policy under which the Claimant's first Solicitors had acted but argued that because DAS had declined to indemnify

the Claimant in respect of work undertaken by IM, (who were not on the DAS panel) and because any BTE insurance would not have given sufficient cover, it was appropriate for a CFA to be entered into.

Certain inconsistencies in the Replies to the Points of Dispute and subsequent information/documentation disclosed, resulted in the claimant's solicitor at IM serving a witness statement. The solicitor attended the detailed assessment hearing and was questioned by counsel for both parties. The detailed assessment was then adjourned for counsel to serve written submissions.

Master Wright found that although IM had not had sight of the DAS policy, the Claimant was aware of it when he first instructed them, and the solicitors who had conduct of the matter were well aware of the terms of DAS policies of its kind. The Claimant was a professional quantity surveyor, described by his solicitor as '[an] educated and articulate man who was keen to understand all aspects of his legal representation ... he is university educated, ... he stands out in particular for the inquisitive and pertinent nature of the questions he asked about both the medical and legal issues - which includes issues relating to costs'.

Master Wright further commented that although the guidance in paragraphs 71-77 in **Garrett & Myatt** was not exhaustive, 'given the nature of the client, the circumstances in which Irwin Mitchell were instructed and the nature of the claim, it seems to me to have been reasonable for Irwin Mitchell to have dealt with the matter as they did'.

He concluded that the conditions specified in paragraph 107 of the judgment in **Hollins**, i.e. 'the conditions applicable to the CFA by virtue of section 58 of the 1990 Act, had been sufficiently complied with in this case'.



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## Recent Cases...

### More on CFA's - dead but refusing to lie down

THE Defendant in the case of **John Michael Hutchings and The British Transport Police Authority** served a Part 18 request for further information in an attempt to find a technical point that would render the Claimant's CFA unenforceable. The Defendant submitted that 'now the CFA Regulations have been revoked ... the point of principle remains that the paying party is entitled to know whether a Claimant has acted reasonably in entering into the particular funding arrangement'.

The request raised 13 questions, subsequently reduced to six of which two were ultimately ineffective. Senior Costs Judge Hurst, sitting as a Recorder in the Central London County Court, had no doubt that the Part 18 request 'was a brash and ill considered attempt to uncover information which would enable the Defendant to challenge the Claimant's bill on a technical point, in the hope of being able to demonstrate that the CFA Regulations had not been complied with, and that therefore no costs at all were payable'. He then took the opportunity to give guidance as to how CPD 35.7 allows a party which serves Points of Dispute, when the receiving party is claiming an additional liability, to include a request for information about other methods of financing the litigation. Senior Costs

Judge Hurst indicated that whilst the overriding objective must be borne in mind and in particular the requirement of proportionality, 'a paying party must however be in a position to understand the claim for costs being made against it, and is entitled to challenge items which it feels to be disproportionate and unreasonable'. He set out the questions

which the paying party can legitimately ask.

- i) Does the Claimant have insurance?
- ii) With whom?
- iii) Does the Claimant have any legal expenses insurance?

*Senior Costs Judge Hurst Sitting as a Recorder in the Central London County Court 11.10.2006  
[no neutral citation number as yet]*



## Cases in Brief...

### Say what you mean!

FOLLOWING a complex and lengthy criminal case, most of which took place in the United States of America, the Defendants in the criminal case (including Mr Brewer) stood trial at Southwark Crown Court. At the end of the criminal trial, the judge directed the jury to return "not guilty" verdicts. The Claimant's counsel obtained an order for costs to be paid, both in respect of Mr. Brewer's out of pocket expenses after the grant of legal aid, and also to cover a period of time prior to the grant of legal aid where other expenses were incurred."

Two claims for costs were submitted, one by the Claimant's English Solicitors and one in respect of work done by an American attorney (who had

subsequently married the Claimant!).

Whilst the majority of the judgment is case specific it is worth mentioning because of comments made in the final three paragraphs, that "Practitioners should ensure that, where separate and to some extent conflicting claims [for costs] are to be presented, they should be presented together in a manner which makes clear the relationship between them". In practical terms, this case serves as a good reminder that everything possible must be done to present a claim for costs with clarity. This is particularly important where the order made is in any way out of the ordinary.

*The Queen on the Application of Frederic Peter Brewer and Supreme Court Costs Office [2006] EWHC Civ 1944  
(Admin)*

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## Cases in Brief...

### Enforcing costs orders against a legally aided party - What's the hurry?

FAILURE to enforce promptly a costs order (interlocutory or final) made against a legally aided party, represents a significant trap for the unwary in the form of Section 11 of the Access to Justice Act 1999. Section 11 provides the mechanism for determining what, if any, amount it is reasonable for the legally aided paying party to pay in respect of the costs order made against that party. Regulation 10 of the Community Legal Services (Costs) Regulations 2000 provides such an application to be made within three months of the order in question.

The case of **Hatton -v- Hopkins** involved complicated and drawn out litigation between the parties, one aspect of which was that a costs order was made in Mr Hatton's favour in March 2003 against the legally aided defendants.

The bill of costs was prepared and detailed assessment proceedings began in June 2003. So far so good.

However, Mr Hatton failed to make a Section 11 application within three months of the costs order made in his favour. The specific facts of the case and the judgment given in October 2005 make interesting reading for those of you who have time.

However, the implications of the judgment are far reaching. It has confirmed that a Section 11 application must be made, if at all possible, within three months of the costs order. Crucially, Mr Hatton's decision to wait until all proceedings had concluded between the parties was held to have been wrong (although the position might have been different in relation to the outcome of any appeal).

Interestingly, the judgment did not specifically rule on whether making one unsuccessful application for an extension of time would prevent a later application on different grounds. Equally, the judgment did not deal with the situation where an unsuccessful application is made on one ground, but because of a change of circumstances, a further application on the same ground could be made.

Where the legally aided paying party is unlikely to be assessed as liable to make any contribution towards the costs of the receiving party, the matter can, perhaps, be safely left. However, if there was any chance that a Section 11 application is necessary, both that application and the detailed assessment process will both need to be commenced within three months of the costs order in question.

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## Useful Information...

# Keeping your client 'on side'

by **Victoria Hopkins**  
of **Hopkins Legal Costs Limited**  
Tel: **01590 676760**

IN my work as an assessor for the Law Society's Remuneration Certificate Department, I frequently have to recommend reductions to solicitors' bills. The vast majority of those reductions are not the result of shoddy or unreasonable work, but a lack of communication between solicitor and client. My aim in this two-part article is to identify some of the common pitfalls that can result in a reduction to your bill, and look at ways to avoid them. I should add that the opinions I express below are my own, not those of the Law Society.

Solicitors are arguably the most regulated professionals in the country, so it is easy to forget that the only thing required to create a retainer between solicitor and client is an instruction. When your client instructs you to carry out work, you are entitled to be paid. However, the amount of that payment depends on the terms of the retainer, and it is in the communication of those terms to the client where solicitors often come

unstuck. The Solicitors Costs Information & Client Care Code 1999 requires solicitors to give certain information to clients. The solicitor's charging structure must be set out explicitly, whether that be a fixed fee, an hourly rate or another arrangement.

It is not always enough simply to send your standard client care letter. For example, I have encountered many situations where a solicitor has taken instructions at an initial interview and has agreed with a new client that he will advise in writing as to the best way to proceed. The solicitor then carries out some work, possibly spending several hours on consideration and research. He writes to the client with detailed advice and, at the same time, encloses his terms of business. The client decides not to proceed. The solicitor renders his bill. The client throws up his hands in horror and says that he wasn't expecting to pay a bill because he hadn't told the solicitor to go ahead yet. In this situation, I would have to recommend to the adjudicator that a nil certificate be granted. The client cannot be expected to pay for work

carried out before the solicitor's terms were communicated to him. If you intend to charge for this kind of preparatory work before sending a client care letter, make sure you tell the client your hourly rate and how much time you intend to spend, and then complete an attendance note recording the conversation. It may seem obvious to you that you do not intend to work for nothing, but that is not necessarily clear to the client.

In the next issue of **Costs Recovery News** (available by e-mail only - see front page), I will look at estimates - in my experience the most common reason for a reduced remuneration certificate.



## Cases in Brief...

# You want how much?

CPR 44.3(2) reminds us that 'the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party', but when a party has recovered only 10% of its original claim, can it be considered to be 'the successful party'?

Originally the Applicants had served draft particulars of claim indicating that they were seeking £3.75 million in respect of damages, costs and interest. The Defendants denied liability and rejected the suggestion of mediation on the grounds that the applicants had not particularised the claim. Formal particulars of claim were then served, this time seeking £350,000.00.

Unfortunately for the Applicant, the single joint expert valued the claim at a mere £38,000.00. The Applicant then put forward a Part 36 offer in the sum of £38,000.00 plus costs. The Defendant

countered with a without prejudice offer of £38,000.00 but no order for costs. The parties agreed that the court should be asked to determine the costs issue.

The Court held that under CPR 44.3, a party's conduct can be considered when deciding what order (if any) to make about costs, and includes under CPR 44.3(5)(d) 'whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim'.

In this case the Court found that the Applicants had accepted an offer that represented only 10 per cent of the pleaded claim, 'which could not be regarded as a significant win'. In the circumstances, the appropriate order was no order as to costs.

*Hooper & Anor v Biddle & Co (A Firm) (2006) Chancery Division 11.10.2006 [no neutral citation as yet]*

## Civil Justice Council Recommendations No. 3

RECOMMENDATION 3 of the Civil Justice Council in the Report "Improved Access to Justice - Funding Options & Proportionate Costs" was that the Predictable Costs Scheme (CPR Part 45 Section II) should be extended to include all personal injury cases in the Fast Track and should include fixed costs from the pre-action protocol stage through the post issue process, including the trial. This was linked to Recommendation 2 which recommended an increase in the Fast Track limit to £25,000.00, with an optional opt-in for cases up to £50,000.00 in value. It is recommended that fixed success fees, fixed/guideline ATE premiums and fixed/guideline disbursements should also be part of the scheme, albeit with a proposed escape route for exceptional cases. CPR 45 Section IV has, of course, already seen the extension of fixed costs to include employers' liability claims where the claim is in respect of bodily injury sustained during the course of employment and the client has entered into a CFA.

The Civil Justice Council sees the further extension of predictable costs to include fast track personal injury cases as a logical step and as a way of filling important gaps left by the predictable costs schemes already in place.



Profit Pointers...

## Instructing your costs draftsman - a vital step

TIME is of the essence - if there is likely to be any significant delay in receiving the authority for detailed assessment, there's nothing to stop the file being sent on, with full details of the costs order, so that work can begin. Up-to-date time recording and ledger printouts, together with disbursement vouchers, need to accompany the file. Sometimes the trial

bundle will contain all the additional documentation the costs draftsman needs. If not, pleadings, reports and other documents will need to be sent. If in doubt, send too much, rather than too little.

We at **Deborah Burke Costing Ltd** have a pro-forma instruction

sheet which is available via the 'Contact Us' button on our website ([www.dbcosting.co.uk](http://www.dbcosting.co.uk)). This helps the fee earner to set out clear instructions for

costing the file. Although lengthy instructions are very seldom necessary, making sure that the costs draftsman is aware of all relevant points is vital. Time and money will be lost if insufficient information is exchanged at this stage.

When the file is large or urgent or complex, we encourage our clients to ring us before it is sent. Advance warning gives our team the opportunity to allocate specific time to the case and this can often reduce the total time required to deal with the file. A good relationship with your costs draftsman saves time and improves your costs recovery and, ultimately, your profit.

## Hourly rate reviews - don't hold your breath . . .

NOTHING is definite yet, but it is rumoured that there will be no increase in the published hourly rates with effect from 1st January 2007. As was reinforced in the guidance of Master Hurst in the case of (**Various Claimants v TUI UK Ltd and others** (SCCO 2005) paragraph 58), the published guidelines were

only ever intended to be just that, guidelines. The upward reviews in 2001, 2003 and 2005 did make it seem as if, for once, we could rely on something in costs happening to plan! Perhaps not. We'll update you further in the next issue of **Costs Recovery News**, (available via e-mail only - see front page).

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