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

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Debbie Burke ~ Editor

Welcome to the first edition of *Costs Recovery News* in 2007.

March is always a favourite month for me, quite aside from the fact that it contains my birthday and Mother's Day! For us at **Deborah Burke Costing Limited** (as for many of you), it is the last month of the financial year and so it is a time for our team to reflect on what we have achieved in the last year and to set targets and goals for the next financial year. In common with all of you, we need to plan ahead, to review our budgets and our marketing strategy and to look at how we can make the service we give to our clients even better. We know that our growing number of clients rely on us to maximise the profit for each file we deal with. Building good personal relationships with our clients is crucial, as is the strength of our technical knowledge and our attention to detail.

Our skills have been much in demand recently, particularly in relation to the decisions in **Myatt** and **Garrett**. I have heard rumours that the appeal in **Myatt** is very much imminent. Whatever the outcome of that appeal, it is worth remembering that the case itself very much turns on the evidence on the file of compliance with the relevant regulations. Where firms do not operate good systems for recording advice given, they may encounter difficulty in providing evidence of compliance.

As with all costing issues, it sometimes

only becomes apparent that there may be difficulty recovering costs, months and sometimes years after the file was set up. We at **Deborah Burke Costing Limited** have extensive experience of considering the issues arising out of **Myatt**, **Garrett** and similar cases and advising clients as to how they should proceed. We automatically consider technical issues arising out of a file and discuss them with the fee earner before proceeding to prepare a bill. It is all part of the comprehensive service we provide.

As part of your forward planning process, I recommend all of you to the article on page 6 by Tony Ulph of F&I Solutions.

Tony's article looks at the effect of the new regulations governing claims management services. I am sure that Tony's reminder that every firm involved in taking referrals for the personal injury market must review its arrangements, is a timely one. Yet another factor to consider when planning for the future.

I would like to finish with a brief word about **Garrett**. As we go to press, there are rumours that in a judgment out of Oldham County Court, the Court of Appeal decision in **Garrett** has been held to apply to an Accident Line Protect policy. As ever, plus ça change, plus c'est la même chose.



Recent Cases...

Solicitors beware when your client disappears!

A solicitor had found himself in the unenviable position of having a wasted costs order made against him when, on the morning of a trial in June 2006, his client rang him to say that he had no intention of coming to court! Attempts were made throughout the morning to trace the client, who had entered a not guilty plea, and an application for an adjournment was made but refused. In the circumstances, the solicitor informed the judge that he was withdrawing from the case and counsel indicated that she would also have to withdraw.

The judge indicated that he could see no reason why either the solicitor or counsel should withdraw, as they were both fully instructed up to the morning of the trial. Both the solicitor and counsel took advice from their professional bodies and reiterated their intention to withdraw. The judge

therefore adjourned the trial and made a wasted costs order against the solicitor and indicated that he would be making a formal complaint to the Law Society.

On appeal, both the Law Society and the Bar Council were represented.

It was noted that counsel had behaved *'with exemplary tact, and legitimate persistence, in difficult circumstances'* at the hearing. The judgment deals in detail with the definition of wasted costs and the circumstances in which a wasted costs order should be made.

The Court of Appeal concluded that a wasted costs order should not have been made and the appeal allowed, with the wasted costs order being quashed.

In the Matter of Harry Boodhoo, Solicitor (2007)
[2007] EWCA Crim 14



Recent Cases...

Sick as a parrott . . .

IN the original action, Fulham Leisure Holdings Ltd (the vehicle chosen by Mr. Mohamed Al Fayed to purchase Fulham Football Club) brought a negligence claim against Nicholson Graham & Jones.

The Claimant maintained that the Defendant's negligence led to it having to spend £7.75 million as a cure for the negligence. In addition, more than £100,000.00 was claimed for costs. At the end of the trial (which was heard over twenty five days), Mr. Justice Mann found that the Defendants were negligent but not liable for the loss claimed.

He found that the £7.75 million claimed 'was not a reasonable sum to pay to cure the negligence, and ... it does not provide a proper measure of the loss of the claimant in the case'. With regard to the legal costs, Mr. Justice Mann allowed £6,750.00 finding that 'the other fees have not been sufficiently proved'.

The costs of bringing the action were dealt with on 5th October 2006.

Mr. Justice Mann found that he had to deal with several factors in considering the costs issues:- the parties could not agree on who had been successful in the action; there had been a drop-hands offer made by the Defendant before a Part 36 payment was made by the Claimant, which the Claimant had failed

to beat; the Defendant had incurred considerable costs instructing an expert witness who was not called and there was also an argument concerning the costs of an adjournment of the trial.

Mr. Justice Mann found that the Defendant was the successful party for the purposes of CPR 44.3 and went on to consider the costs from the date of the Part 36 payment and the costs before the Part 36 payment.

As expected, with regard to the post Part 36 payment, he found for the Defendant.

With regard to the costs incurred prior to the Part 36 payment, Mr. Justice Mann considered that 'the appropriate way of considering the effect of this offer is to consider what the appropriate costs order would have been absent this letter, [i.e. the letter making a drop-hands offer] and then compare that position with the offer made and see what effect it should have'.

He found that the issues of liability and causation/quantum formed very significant parts of the case, and that the costs should be roughly split 50/50 between the two issues. Each party had won on one issue, the Claimant on liability and the Defendant on causation/quantum. Therefore, the appropriate order would have been no order as to costs, which is what the

position would have been had the Claimant accepted the drop-hands offer made in December 2004. Therefore, 'since it was an offer which ought to have been accepted, the costs since the date when [the offer] should have been accepted ought not to have been incurred. ... Accordingly the defendants should have their costs from the date when that offer ought to have been accepted'.

With regard to the cost of the expert witness, Mr. Justice Mann stated that although 'I do not accept that the mere fact that the evidence was not deployed is sufficient to justify my disallowing the costs of the expert. The proper question seems to me to be whether the costs were reasonable' [our emphasis], he found that in litigation costs terms it was not reasonable for the Defendant to have instructed the expert in the first place.

The adjournment of the trial had arisen as a result of a request from the Defendant to amend the defence and for extensive disclosure. In respect of this issue it was found that both parties had contributed to the adjournment and that both parties had benefited from the adjournment and that therefore 'the fair order in relation to the costs thrown away by the adjournment is that each side should bear its own costs'.



Recent Cases...

Who should have the costs?

THIS appeal against an order for costs made by Master Bragge on 24th October 2005 was heard on 17th November 2006 by Mr. Justice Kitchen. Yet again, it was necessary to decide who the "winner" was.

The Claimants were clients of the Defendants, a firm of solicitors which had dealt with conveyancing matters on their behalf.

The Claimants maintained that the Defendants had, over an extended period of time, failed to account to the Claimants for monies held on their behalf and on 24th September 2004 the Claimants issued Part 8 proceedings.

A hearing took place in February 2005 when it was accepted that there were errors in the statements and reconciliations that had been produced and that further monies were due to the Claimants. It was argued, however, that completion or cash statements had been sent to the Claimants and in particular to one of them in May 2004. This was disputed.

Directions were made with the costs being reserved for a further hearing. The First Defendant was ordered to produce a witness statement in support of the claim.

When the matter came before the court again in October 2005, Master Bragge decided to make no order as to costs.

A dispute arose as to the proceedings which the order made in October 2005 related to. The Claimants maintained that it related to all the costs of the Part 8 claim whilst the Defendants submitted that it related only to the initial hearing in

February 2005, when costs had been reserved.

On appeal, Mr. Justice Kitchen had to consider whether it was appropriate for the High Court to interfere with the Master's discretion in relation to costs. His judgment includes a detailed summary of the facts leading up to the issue of the Part 8 proceedings and the

Master's decision and concludes that the Master erred in failing to attach sufficient weight to the fact that the Claimants had been largely successful. Mr. Justice Kitchen directed that the Claimants should be awarded 75% of their costs of the Part 8 Claim and awarded the Claimants their costs of the Appeal.

Ref: Raj Tankaria and 6 Ors v (1) Lorna B Morgan (2) A O Fagade (3) S Ismail (2006) [2006] EWHC 3090 (Ch)



DEBORAH BURKE COSTING LIMITED

Law Costs Draftsmen and Consultants

WHY ARE SO MANY SOLICITORS' FIRMS NOW INSTRUCTING US TO HANDLE THEIR COSTS RECOVERY?

"Reforms are centred on a sustainable market-based approach that gives the most efficient providers incentives to continue in operation and grow their businesses"

Vera Baird, the Legal Aid Minister

Access to justice requires "sound legal advice and the presence of business skills necessary to provide a cost effective service in a consumer friendly way"

David Clementi

It is clear that the legal landscape is changing forever...but what difference will this make to you personally?

- Will work come to you as easily as it did in the past? No, it won't.
- Is competition between you and other lawyers and non-lawyers on service and price going to intensify in the very near future? Yes, significantly.
- Will there be intensive scrutiny of fee earners' case management skills, the overheads required by fee earners to earn their fees and the way in which fee earners deliver services to clients? Without a doubt - don't forget the vision of "Tesco law".
- Will the financial pressure on solicitors' practices lessen? Not unless they are ahead of the competition.
- Will the fallout from Clementi, Carter et al only affect you if you are involved in low value, high volume pi work? No - all fee earners will feel the impact of this legal revolution.

What difference will we make to you?

An ongoing relationship with *Deborah Burke Costing Limited* is part of the solution to the threat you face to your profit and, by implication, your survival.

- You can concentrate on fee earning work - we will track down the missing disbursements and liaise with counsel and experts to make sure that the claim for costs is accurate and complete. We will tell you about difficulties on files - forewarned is forearmed.
- Increased invoicing - we will find the potentially lost profit costs on your file - the time not recorded, the time which has been recorded but which doesn't get entered onto your computerised system, the time of other fee earners which is obliquely referred to but not itemised.
- You'll have confidence in your costs recovery - we will advise you on how to increase your efficiency and your ability to deliver the legal service you provide. You can rely on the information we give you and plan accordingly.

Contact us to find out what a difference we can make to your costs recovery - or send us your files today.

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The Association of Law Costs Draftsmen



Cases in Brief...

Indemnity costs - when should they be ordered?

AT trial, serious flaws were exposed in the Claimant's expert witness testimony which revealed weaknesses in the Claimant's technical case. The Claimant failed on most issues and as losing party was ordered to pay the Defendant's costs. The judge was critical in his judgment of the Claimant's expert evidence and the Defendant applied for costs on the indemnity basis. It was held that whilst normally a Claimant who does not beat a payment in does not have to pay indemnity costs, there can be surrounding circumstances that make continuing the claim after the making of a payment in unjustified, so that indemnity costs should be awarded. It was also held that an expert, though owing a duty to the Court, is still the witness of the party calling him, and his serious failings may make it just to order indemnity costs. In the particular circumstances of the case, the fact that the Claimant continued with the claim after the Defendant's payment in was not so unreasonable that costs should be paid on the indemnity basis. However, certain deficiencies in the Claimant's expert evidence meant that certain of the costs incurred by the Defendant in dealing with the evidence should be paid by the Claimant on the indemnity basis.

Ref: *Balmoral Group Ltd-v-Borealis (UK) Ltd* [2006] EWHC 2531 (Comm)

Behind the headlines

AT the beginning of 2007, News Group Newspapers Ltd, won the libel action brought against it by Marjorie Tierney. In December 2006, the parties had been in court in relation to an appeal from a costs capping order made by Master Campbell on 29th September 2006.

Two aspects of the costs capping order were focused on in the appeal. Firstly, the Master's decision that the case did not merit the instruction of Leading Counsel for the trial and secondly, an additional £20,000.00 by way of solicitors' costs was sought to cover 'necessary and proportionate expenditure'.

The libel action itself was a high profile case which combined, according to The Honourable Mr. Justice Eady, 'two of the topics which are closest to the hearts of tabloid editors; namely sex and football' He went on to say that 'it is inherent in the task of prospective costs capping that a good deal of informed guess work will come into play'.

The costs cap had been set at £92,630.00 for base costs including Counsel's fees.

This was approximately £100,000.00 below the estimate supplied by the solicitors. A major cause of the reduction was the Master's contention that Leading Counsel was not necessary, the case being perceived as a "modest one". In addition, the solicitors' costs were allowed at some 40% less than the estimate.

At the appeal hearing, it was decided that the Master had not given sufficient reason for the 40% reduction in the solicitors' costs and that bearing in mind the might of the opposition, who could well afford to instruct Leading Counsel (although they had agreed that they would not do so), the decision that the case did not merit Leading Counsel was not consistent with "equality of arms".

This is an interesting and informative decision that reminds us of the importance to ensure as far as possible "equality of arms" for the parties. It also sets out the history of costs capping and refers to the seven pillars of wisdom set out in CPR 44.5.

Ref: *Marjorie Patricia Tierney v News Group Newspapers Ltd.* (2006) [2006] EWHC 3275 (QB)



Useful Information...

Civil Justice Council Recommendations

The Civil Justice Council looked in detail at the issue of third party funding. Particular consideration was given to the case of *Arkin v Borchard* (which we covered in our very first issue of *Costs Recovery News* in July 2005). The conclusions of the Court of Appeal in the Arkin case, "that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided" were adopted by the Civil Justice Council who recommended that further consideration should be given to the use of third party funding as a "last resort" means of providing access to justice. The Council took particular notice of the fact that the Court of Appeal anticipated that a professional funder would become more likely to cap the funds that they provided in order to limit their exposure to a reasonable amount and that this should have a "salutary effect in keeping costs proportionate".



Useful Information...

Keeping your client informed of costs

by Victoria Hopkins
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Part II

IN the first part of this article, (see issue 8 of **Costs Recovery News**), I referred to the need to give your client costs information immediately upon receipt of instructions. I now turn to the issue that in my experience most often results in a reduced remuneration certificate being issued: estimates.

It is not surprising that estimates cause so much trouble. The solicitor, in giving the estimate, is well aware of the variables that are likely to affect its accuracy. The client, in contrast, simply remembers the figure and is horrified to receive a bill for a greater amount, whatever has occurred in the meantime. If the client's most common complaint is an unexpectedly high bill, the solicitor's most common reply is that he was required to carry out much more work than he was expecting in order to achieve the result sought by the client.

The Solicitors Costs Information and Client Care Code 1999 requires you to give a costs estimate to your client, and states that if you cannot give an overall estimate, you should give one for the "next stage". It is not sufficient simply to tell the client that you are not in a position to estimate your costs. If you need more information before

committing yourself, tell your client that, and give an estimate as soon as you are able. It might seem arduous - you want to get on with the substantive work and achieve a good result for your client - but on these simple actions could hang your profit.

The majority of firms now use a time recording system that will alert fee-earners when an estimate is about to be exceeded. It should therefore not be too laborious a job to ensure that the client is kept up to date. If you revise an estimate verbally, don't forget to keep an attendance note. The hardest issues to resolve on assessment are those where neither party can produce evidence of their recollection.

Although it is vital to give your client an estimate of costs, there is no need to make a rod for your own back. I came across a case where the Rule 15 letter included an estimate and told the client that if the estimate was exceeded, he would be invited to a meeting with the solicitor and a partner, at which a new estimate would be agreed and confirmed in writing. The solicitors were unable to meet their own unnecessarily exacting standard, and suffered a reduction in their bill as a result. It should be quite sufficient to write to the client stating that the estimate has been exhausted (stating brief reasons if matters have become more complicated than expected) and giving a revised estimate.

The common theme among the points I have made in this article is that a client is much less likely to express dissatisfaction with his solicitor's fees if he is expecting them. A nasty surprise at the end of a case will often trigger a remuneration certificate application. Communicating your terms of business promptly, giving clear costs information and ensuring that estimates are updated will go a long way to avoiding an application and preventing the breakdown of a prosperous client relationship.



Watch this Space

Recoverable fees

Woollard v Fowler and Crane v Cannons Leisure Centre - an update

You may recall the case of *Woollard*, concerning the recoverability of medical agency fees within the predictable costs regime (see issue 6 of **Costs Recovery News**). The decision of Chief Master Hurst that nothing in Part II of CPR 45 prevented a solicitor delegating work to a third party and claiming the costs as a disbursement, was being appealed, and the appeal hearing had been listed for January 2007. The appeal has now been stayed and it is understood to be likely that the parties will come to an agreement before the next hearing.

In the linked appeal of *Crane*, the court is looking at the status of costs draftsmen in the context of recovering a success fee on the fee of an independent costs draftsman for preparing a bill of costs. The appeal turns on the issue of whether the costs draftsman's fees should be treated as a disbursement or part of the profit costs. That appeal is proceeding.

Harmonised rates

HARMONISED rates for family work in Family Proceedings Courts and County Courts will be introduced in April 2007. The new rate for preparation will be £61.00 per hour plus VAT [£66.00 per hour plus VAT in the South Eastern Circuit]. This is obviously a lower rate than that currently claimed for County Court work, and higher than the rate currently allowed for preparation in the Family Proceedings Courts. It is understood that the new rates will apply to all work carried out on or after 2nd April 2007.

Hourly Rates - Well I never!

In our last issue of **Costs Recovery News**, we expressed doubt as to whether there would be an increase in the published hourly rates with effect from 1st January 2007. We are delighted to see that our concern was unfounded. Details of the new guideline rates can be found at www.hmcourts-service.gov.uk/publications/guidance/scco/appendix_2.htm



Useful Information...

Claims management - the new regime

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Tony asks.....Are you ready for 6 April 2007?

The Government's initiative to regulate the claims management sector is set to come into force on April 6 2007. After intense consultation through the latter half of 2006, the new Compensation (Claims Management Services) Regulations 2006 will shortly take effect.

Introducers involved in providing claims management services, including personal injury, had until February 16th 2007 to submit their applications to the DCA. From 6th April 2007, it will be an offence to provide unregulated claims management services without authorisation.

The move to regulate the sector is long overdue and is welcomed by all those who support the industry.

The conduct rules are straight forward. Broadly, they require introducers to ensure that the interest of the client is foremost. For example, cold calling is prohibited, business cannot be solicited in medical facilities without approval, and cash inducements to claimants are prohibited.

The use of the statement "No win no fee" will require clarification under the regulations. In addition, introducers will be required to disclose all charges

including referral fees and other commissions or payments received with the intention of improving transparency, and to ensure that clients are treated fairly.

The effect of regulation should be a consolidation of the market and an upturn in consumer confidence.

There are some exemptions however, where claims management services are incidental to an introducer's main business, and no more than twenty five cases in total per quarter are introduced. Most important of all for solicitors is that under the terms of their own regulation by the Law Society, they are responsible for ensuring that introducers are correctly authorised and comply with the regulations if they wish to take work from the introducer.

It is vital therefore that every firm involved in taking referrals in the personal injury market reviews its arrangements before the end of March. If an introducer cannot demonstrate that it is authorised, you should no longer deal with them, unless you can be sure that they are exempt. Undoubtedly some introducers will look for loopholes, but having worked closely with the DCA we believe these unauthorised introducers will be quickly identified and closed down.

In addition, the Solicitors' Regulation Authority has also declared a very public interest in referral arrangements with the recent distribution of its leaflet warning of a crackdown.

Information regarding the new rules is available on the DCA web site www.dca.gov.uk



Watch this Space

Getting ready to get Carter!

WHEN the Carter Report was first published last Autumn, one of the main criticisms was that the timetable for the proposed reforms did not leave enough time for consultation on what will be the most sweeping reforms to the legal aid system for many years. Some backtracking has taken place, and now the majority of the reforms will be implemented in October 2007, although a large amount of the detail as to how the reforms will be implemented is still awaited. Papers are expected in the near future to deal with the boundaries for police station work; very high cost criminal cases; the roll-out of the preferred supplier scheme; the revised plans for family graduated fees from October; the revised mental health scheme and the revised immigration scheme.

United contracts

DESPITE the fact that advice given to the Law Society on the proposed Unified Contract is that they are inequitable and prejudicial to the interests of legal aid practitioners, the DCA is determined that Unified Contracts will be in place for when the current contract expires at the end of March. There is much discussion amongst legal aid firms with regard to signing the new Unified Contract, but firms find themselves in an invidious position. If they do not sign up to the new Contract, then even if they continue to take on legal aid cases it appears that they will not get paid for the work they do. It is also apparent that a number of larger firms who have legal aid departments are deciding not to take on any further legal aid work, having become disillusioned with such departments being subsidised by the rest of the firm.