NEWSLETTER

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FEATURED CASES

01 **DR J B Ilangaratne -v- British Medical Association [2007] EWHC 920 (CH): Indemnity Principle - The effect of a "standing arrangement" between insurers and solicitors.**

02 **Mastercigars Direct Limited -v- Withers LLP – SUP CT costs office (Master Rogers) 25 APRIL 2007: Failure to comply with solicitors' costs information and client care code.**

03 **Sian Harries -v- Sean Summers LTL 15 MAY 2007 (unreported elsewhere) – summary assessmentment: should the Lownds two-stage test apply to both detailed and summary assessments?**

04 **Anne Reid Barnes and Donald McKenzie Barnes -v- Messrs Stones (a firm) [2007] EWHC 90069 (costs) - solicitors act 1974: 1. When is a bill not a bill? 2. What are section 73(3) "special circumstances"?**

OTHER RECENT CASES

Tony Lamont -v- James Burton [2007] EWC Civ 429. Fixed recoverable success fees.

Brenda Willis -v- Neil Alick Nicolson (by his mother and litigation friend Betty Nicolson) [2007] EWC Civ 199. Appeal against a costs capping order.

Various claimants -v- Gower Chemical & others CC (Cardiff) (Field J) 28 February 2007. Failure to comply with CCFA R 2000 Regulation 5(1).

Dennis Percy Wakeling -v- Patrick Bernard Harrington (Liquidator of Chelmsford City Football Club (1980) Limited (2007) [2007] EWHC 1184 (Ch). Did a solicitor's agreement not to seek any further fees from his client and that any further money the solicitor received would be recovered from the paying party amount to a void CFA?

The four featured cases illustrate well that uncertainty still exists in fundamental areas of costs law and practice.

Our first featured case – *Dr Ilangaratne -v- BMA* – dealt with the effect of a "standing arrangement" between insurers and solicitors instructed by them to act on behalf of an insured. Whilst it was no great surprise that the court found that the charging rates agreed in general terms (i.e. unconnected with any specific retainer) are incorporated into each subsequent retainer unless a contrary intention is expressed, this case highlights well the need to issue proper comprehensive client care letters to both the insured (as the party primarily liable for fees) as well as to the insurers.

Our second featured case - *Mastercigars Direct Limited -v- Withers LLP* – highlights the potentially devastating effect on your business of a failure to comply with the Solicitors' Costs Information and Client Care Code. This is an area that we have previously covered in our seminar programme and later in the year our seminars will focus on the Solicitors' Code of Conduct [2007], which comes into force on 1 July 2007. In this case the Defendant firm had rendered bills totalling approximately £1.1M, but was held bound by an estimate of only £265,570 (but with some exceptions conceded by the Claimant). It is clear from the Judgment that the solicitors' case unravelled partly because they were unable to produce documents and attendance notes to support what was said in their statements and under cross-examination.

In our third featured case – *Sian Harries -and- Sean Summers* – the Judge confirmed that the now familiar two-stage approach to proportionality (the Lownds approach) applies to summary assessments as well as to detailed assessments. Our fourth featured case – *Barnes –and- Messrs Stones* – concerned a "bill" which the Master found was not in fact a bill enforceable by action. The "bill" in question was found to be defective in almost every way and the case highlights the expensive muddle that can ensue if solicitors fail to comply with the basic requirements of the Solicitors Act 1974 s69.

Michael Heslin, 30 May 2007

01

Dr J B Ilangaratne -v- British Medical Association [2007] EWHC 920 (Ch)

An insured's costs claim did not breach the indemnity principle where there was a "standing arrangement" already in place between the insurance company and the solicitors instructed by them to act on behalf of the insured.

Dr Ilangaratne was an unsuccessful claimant in a negligence action brought against the British Medical Association ("the BMA"). Dr Ilangaratne was ordered to pay the BMA's costs. Dr Ilangaratne argued that because the BMA had defended the claim with the assistance of insurers (Royal & Sun Alliance – "RSA"), and RSA had instructed Messrs LeBeouf, Lamb, Green and MacRae ("LLGM"), and because the BMA had not disclosed its contract of insurance with RSA it should be inferred that there was no retainer between BMA and LLGM pursuant to which the BMA were under any liability to pay LLGM's fees.

There was no evidence adduced to suggest that the arrangements between BMA and RSA were any different from the general run of actions where a party is insured. Therefore that limb of the appeal was rejected at a previous hearing on the conventional ground that where solicitors are instructed to act on behalf of a party by their insurers and at their insurers' expense the court will infer in the absence of evidence to the contrary that the party is nonetheless the client of the solicitors pursuant to a contract of retainer. However, although the court found no breach of the indemnity principle Warren J was told that there was already a "standing arrangement" in place between RSA and LLGM as to costs. The court therefore remitted the matter back to the Costs Judge to enable him to take such steps as he felt appropriate to satisfy himself whether or not the indemnity principle had been breached. The standing arrangement was evidenced by a letter from LLGM to RSA sent in December 2000. The Costs Judge concluded that the December 2000 letter was a binding and enforceable agreement, which included charging rates.

On appeal the Judge found that the December 2000 letter was not itself a written contract of retainer. It was a letter that evidenced the standing arrangement between LLGM and RSA. Mr Justice Briggs said:

"In my judgment, and I have [sic] re-enforced in this by receiving advice as to the experience of my Assessors, who are the very same Assessors as assisted Warren J, where solicitors who contemplate acting in a number of similar matters for a particular client propose, discuss, or agree charging rates in general terms (i.e. unconnected with any specific retainer) then any retainer subsequently made in which there is expressed no contrary intention is likely to be held to include by way of incorporation the charging rates thus proposed, discussed or agreed. In relation to charging rates previously agreed, the prior agreement constitutes a form of master agreement incorporated in each subsequent retainer. In relation to charging rates which are merely proposed or discussed, those proposals or discussions are likely to be found to constitute standing offers to provide legal services if retained within the category of case under discussion, which are by implication or by conduct accepted when instructions for any particular subsequent case are first given and received".

02

Mastercigars Direct Limited -v- Withers LLP - Sup Ct Costs Office (Master Rogers) 25 April 2007

The Defendants were found to be in breach of the Solicitors' Costs Information and Client Care Code 1999 for failing to warn the client that costs were escalating well beyond the original estimate given by them

The Claimant obtained an order pursuant to section 70 Solicitors' Act 1974 for the detailed assessment of 16 of a series of 21 bills rendered by the Defendant totalling approximately £1.1M. A preliminary issue arose as to the scope and extent of the Defendant's estimate of May 2005. The estimate totalled only £265,570 net of VAT.

The trial had been estimated to last for 4 days, however it lasted for at least 15 days (and came before the court on 18 separate days). Whilst the Claimants conceded that far more work was done had been anticipated they argued that most of the additional work was undertaken by themselves rather than by Withers. The Claimants submitted that in effect all Withers had to do was to manipulate the Claimants' own work product into a form that was suitable for use at court (the production of witness statements and so forth). The Claimants maintained that they had never been given any indication of how much more the additional work would cost.

Under cross-examination the Defendant's principal witness, Mr Maycock, conceded that he could not, to the best of his recollection, remember reading the exact detail of the Client Care Code. When asked to explain the reasons for the costs to have so greatly exceeded the estimate, Mr Maycock put the level of Counsels' fees at the forefront of his argument. However, on cross-examination Mr Maycock was forced to concede that Counsels' fees (both Leading and Junior) in fact totalled less than the figures in the estimate. There was a large discrepancy between some of the figures in the estimate and the figures given in the listing questionnaire lodged by the Defendant only 5 days after the estimate was given. The Defendant said that the Claimants' representative (Mr Kenyon) was handed a copy of the listing questionnaire at court; however this was denied by Mr Kenyon and the Defendant was unable to produce an attendance note. The Defendant sought to suggest that the key the problem was the need for success in the underlying litigation, that this implied that the solicitors correctly considered that they had authority to charge what was reasonable to achieve the desired end. However, this was not borne out by the correspondence as the Defendant was forced to concede under cross-examination. The Defendant also failed to produce documentary evidence to counter the Claimants' case that they themselves had carried out most of the additional work.

The Master concluded that the Defendant failed to comply with the Client Care Code by not informing the client of the escalating costs. The Master rejected the submission made by the Defendant that there was a duty on the Claimant (Mr Kenyon), who was a business man and in regular every day contact with the solicitors, to ask for an updated estimate. The Master also said that whilst Mr Kenyon may well have been aware of unexpected twists and turns in the way the case had been prepared, that was not the same as realising that it was going to cost a lot more money. The Master agreed that the case centred on the true contractual position as set out in the documents and concluded that on all the evidence, oral and documentary, the Defendant was bound by the estimate of 6 May 2005 with the exceptions conceded by Mr Kenyon. The exceptions include the fees of Leading and Junior Counsel for the additional days until the end of trial, together with the solicitors' attendance in court on those days.

03

Sian Harries -v- Sean Summers LTL 15 May 2007 (unreported elsewhere)

The District Judge erred in failing to follow the two-stage approach advocated in Home Office -v- Lownds [2002] EWCA Civ 365, namely (a) to first consider whether the total sum claimed is or appears to be disproportionate having regard to the considerations set out in CPR Part 44.5 (3); and (b) if costs as a whole are not disproportionate, to allow such costs as were reasonably incurred insofar as they are reasonable in amount but, if costs as a whole appear disproportionate, then only to allow such costs as he is satisfied were both necessary and, if necessary, reasonable in amount.

This was an appeal from the summary assessment of the costs of a successful Appellant/Claimant by a District Judge at the conclusion of a fast track trial. Costs were assessed at £7,881.63 on the basis of a statement of costs drafted some weeks before the trial and setting out a claim of approximately £9,300.00 plus VAT. The Claimant appealed on a number of grounds. The first, that the Judge ought to have adjourned costs for a detailed assessment, principally because there was insufficient time to conduct a summary assessment, was roundly rejected, the Judge on appeal pointing out that *"… even after a substantial trial it will be rare that there is so little available time that costs which otherwise ought to be summarily assessed are adjourned to a detailed assessment with all of the additional costs and effort that that would involve".*

The main ground of appeal was that the District Judge erred in failing to adopt the two-stage approach of *Lownds*. Counsel for the Defendant submitted, inter alia, that the Lownds approach was *"rationally incompatible with summary assessment of costs"*, arguing that as each of the various categories of costs in a statement of costs will almost always be necessary, if the *Lownds* first stage test were applied to summary assessment, it would always be satisfied. The Judge rejected that argument however and said that Lownds does not require the court to ask *"was any work in that category necessary?", but rather "what work in that category was necessary?".*

The Judge found that the Court of Appeal in Lownds was clearly laying down guidance for both detailed and summary assessments (although technically the comments in Lownds were not binding as that case concerned a detailed assessment). The Judge found that on a summary assessment of costs there are effectively three stages:

1. A consideration and determination of whether the aggregate costs claimed in the statement are proportionate.

2. A consideration of the extent of the work for which a claim is made. If the aggregate costs are proportionate, the costs of work reasonably done are allowable; if the aggregate costs are disproportionate, only the costs of work necessarily done are allowable.

3. A consideration of the costs for work held to be allowable under (ii). In all cases, reasonable costs of such work are allowable.

The Judge had erred in failing to adopt the two-stage approach to proportionality as required by Lownds. However, the statement of costs was defective as it was not in the form required by Form N260 and had not been signed. The Appellant had still not remedied the defects in the statement of costs and had instead produced a full bill of costs suitable for a detailed assessment. Accordingly, and with some reluctance, an Order was made for detailed assessment of costs.

04

Anne Reid Barnes And Donald Mckenzie Barnes -v- Messrs Stones (A Firm) [2007] EWHC 90069 (Costs)

The Claimants sought an Order for the detailed assessment out of time of a bill dated 15 April 2005.

The Claimants sought an Order in standard form for the detailed assessment of a solicitor's bill dated 15 April 2005 and also for an Order pursuant to Section 70(3) of the Solicitors' Act 1974 that there are special circumstances that would allow the making of the Order for detailed assessment.

Part 8 proceedings were commenced in July 2006. Both parties accepted that the bill of costs, if it was a valid bill of costs, was delivered in April 2005 and consequently more than 12 months had elapsed from delivery of the bill by the time the Part 8 proceedings were commenced.

Master Simons found that the bill of costs did not comply with the provisions of the Solicitors' Act 1974 – it was in the form of a breakdown normally lodged once an Order has been made for detailed assessment of a bill, following precedent P of the Schedule of Costs Precedents (Costs PD 48.23.1). The "bill" was not addressed to the Clients nor did it contain any VAT number and nor did it contain any information concerning the Clients' right to have the costs assessed. The "bill" was not properly delivered to the Claimants and was not signed by a partner in the firm. Consequently, the "bill" was unenforceable by action for failure to comply with the requirements of Section 69 of the Solicitors' Act 1974. The document was not a bill of costs at all, it was merely a breakdown.

Notwithstanding the Master's decision the parties asked him to deal with the question of special circumstances under Section 70(3) of the Solicitors' Act 1974 in the event of there being a successful appeal against his finding that the Defendants had failed to deliver a bill.

The Master found that there was a clear indication that the Defendants intended to apply for a detailed assessment of their bill. It was only by letter of 29 September 2005 that they indicated to the Claimants' solicitors that they were not going to seek the detailed assessment of their bill after all and that it was up to the Claimants to do so. The Judge found that the understanding between the parties that there should be a detailed assessment coupled with the delay on the part of the Defendants in firstly preparing a breakdown, and secondly, preparing a bill for assessment, constituted special circumstances that entitled the Claimants to apply for a detailed assessment outside the 12 month time limit.

Other recent cases

Tony Lamont -v- James Burton [2007] EWC Civ 429.

There is no discretion to reduce the fixed recoverable success fee in personal injuries cases where the Claimant fails to beat a Part 36 offer. The court could not use CPR Rule 44 to circumvent the mandatory provisions of CPR Rule 45.

Brenda Willis -v- Neil Alick Nicolson (By his mother and litigation friend Betty Nicolson) [2007] EWC Civ 199.

This was an unsuccessful appeal against a limited costs capping order. The court made general observations about cost capping orders, but concluded that it was for the Civil Procedure Rules Committee to decide whether, and if so with what degree of urgency, to address the difference of judicial opinion as to when and in what circumstances costs capping orders should be made.

Various Claimants -v- Gower Chemical & Others CC (Cardiff) (Field J) 28 February 2007.

The Collective Conditional Fee Agreements Regulations 2000 regulation 5(1) required that there had to be a provision in a Collective Conditional Fee Agreement providing for a success fee that complied with the specification set out in the Regulation. However, a CCFA was not unenforceable if the solicitor failed to comply with the prescribed condition.

Dennis Percy Wakeling -v- Patrick Bernard Harrington (Liquidator of Chelmsford City Football Club (1980) Limited)

The Appellant (W) was ordered to pay costs relating to the setting aside of a legal charge. A dispute over fees between the Respondent (H) and his solicitor (C) had been compromised, with C confirming that he would not seek any further fees from H and that any further money received by him would be that which was recovered from W. On assessment the Costs Judge found that the agreement determined H's liability to pay any further costs to C. The Costs Judge also held that the agreement did not amount to a void contingency fee agreement. On appeal the court upheld the decision that the agreement had not amounted to a CFA and so did it not affect H's ability to recover costs. However, the court also found that the agreement had not amounted to a release of any further liability of H to C. Liability from one person to another could exist notwithstanding that the latter had agreed not to enforce it directly against the former. Therefore, the fact that C had agreed that he would not bring an action against H for his outstanding costs did not necessarily release H of any further liability for costs. The liability of C to H for further fees had not been extinguished; the parties had merely agreed to limit its enforcement. Therefore, the indemnity principle did not prevent H from seeking to recover a contribution to C's additional fees from W.

Seminars

Our most recent seminar covered:

- Pre-issue costs.
- Detailed assessment procedure.
- Back dating interest on costs.
- Changes to CPR Part 36.

Our next seminar will focus on: The Solicitors' Code of Conduct [2007], which comes into force on 1 July 2007.

If you would like a copy of the notes from past seminars or to arrange a seminar for your firm, please contact: Michael Heslin
heslin@denovolaw.co.uk

Coming Up

We are currently involved in a major costs appeal (Dyson – v- Strutt) which will be of keen interest to solicitors and costs practitioners as amongst other issues it will address the continuing relevance (or otherwise) of the Medway Oil decision.

In this appeal, to be heard June 2007, the Claimant was awarded costs of action but for the costs of an issue in respect of which the Defendant was awarded his costs. The court will be asked to decide (a) what costs should be treated as costs common to both issues and (b) whether, and if so to what degree, common costs should be apportioned between the costs of action and the costs of the unsuccessful, discontinued head of claim. A full case report will appear in our next newsletter (December 2007), however if you would like to receive details before then or to discuss any of the issues raised please contact Michael Heslin on 020 3170 8988.

Where to find us

We have recently moved from Citypoint to 60 Lombard Street, London EC3V 9EA.

The DeNovo Newsletter does not provide a comprehensive or complete statement of the law relating to the issues discussed nor does it constitute legal advice.

Specialist legal advice should always be sought in relation to any particular circumstances.

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