

NEWSLETTER

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The biggest problem that we faced in preparing this edition of our newsletter was to reduce it to a manageable size. There are so many reported costs cases coming through that we may need to consider producing 3 or 4 updates each year.

In the last 6 months we have received some excellent and long overdue guidance in a number of areas, including judgment in a case which I was lucky enough to be involved in as part of Dyson's costs team. The *Dyson* case, at last, confirms with absolute clarity that the *Medway Oil* principles apply post CPR (indeed, the minutes of the meeting of the SCCO Costs Practitioners' Group held on 17 October 2007 records Master O'Hare's view that "Dyson has... led to the discovery or re-discovery of further use of the *Medway Oil* principles". *Dyson* is probably the supreme example of what can go wrong when the parties disagree as to the meaning of a costs order, and also why it is necessary in complex cases to discuss with your Costs Draftsman the practical consequences of the orders tendered for. Ultimately Dyson's position was entirely vindicated (at a cost to its opponent of hundreds of thousands of pounds in costs litigation) and a regular source of confusion to costs practitioners has been cleared up – if a "losing" party has been ordered to pay costs of action but nonetheless is to receive his costs of a particular issue, he is only entitled to the additional costs generated by that issue. So *Medway Oil* is alive and kicking and applies not only to the assessment of the costs of a counterclaim (its traditional application) but must also be followed where the parties have been handed an issues based type order as occurred in *Dyson*.

One of the featured cases in our June 2007 issue was *Mastercigars Direct Limited -v- Withers LLP* where Master Rogers concluded that as a result of the defendant's failure to comply with the Client Care Code (by not informing the client of the level of escalating costs) the defendant was bound by an estimate with the exceptions conceded by the claimant. As a result, we warned of the potentially devastating effect on your business of a failure to comply with the Solicitors' Costs Information and Client Care Code. Whilst *Mastercigars* illustrates well the extent to which solicitors are failing to comply with requirements concerning estimates set out in the CPR as well as with the Client Care Code it probably came as a great relief to many solicitors when in November 2007 the Costs Judge's decision was overturned on appeal. In his judgment Mr Justice Morgan said that the solicitors' costs estimate was relevant on a detailed assessment of costs as a useful yardstick, by which the reasonableness of the costs could be measured, and on the issue of reliance by a client on that estimate. However, the contractual position is that solicitors are entitled to a reasonable fee (Supply of Goods and Services Act 1982, Section 15) and it is not the case that the solicitor cannot recover costs in excess of the estimated amount.

Unfortunately, I have not been able to find the room in this edition of the newsletter for a full report on *Mastercigars* but the next edition of our newsletter will cover that case in detail.

Michael Heslin, February 2008

01

Dyson Technology Limited -v- Ben Strutt [2007] EWCH 1756 (CH)

Where a defendant had been ordered to pay the claimant's costs of the action save for the costs of a particular issue (the costs of which were ordered to be paid by the claimant to the defendant) there could be no division of costs that were common to both elements of the claim. The fact that those costs would have been incurred even if the claimant had not pursued that part of the claim on which it did not succeed, required them to be treated as costs of the action and recoverable by the claimant. Therefore, the defendant was only entitled to the extra costs generated by the issue on which the claimant had failed.

The claimant sought injunctions restraining the defendant (an engineer and former employee) from acting in breach of clause 18 of his employment contract (non-disclosure of confidential information) and clause 19 (non-compete) by joining a competing section of Black & Decker. At the beginning of the second day of the trial the claimant discontinued its claim under clause 18 but proceeded with its clause 19 claim on the basis that that was the only feasible way of protecting the confidential information to which the defendant was privy. The claimant succeeded at trial on the clause 19 claim and was awarded the costs of the action save for the costs of the clause 18 claim, which were awarded to the defendant. The appeal concerned the way in which the costs judge interpreted and applied that order when determining preliminary issues. At a hearing in December 2006 the costs judge made several determinations:

1. That the effect of the costs order was to deprive the claimant of 50% of the "general costs" of the action and to award those to the defendant. He described as "general costs" those that would have been incurred in any event whether or not the clause 18 and clause 19 claims had been pursued together. The costs judge described this category of costs as "...costs which are not specific in any way." Examples of non-specific common costs include travel expenses and court fees.
2. Where costs were common to both clause 18 and clause 19 (not being "general costs") the claimant would not be entitled to the entirety of the clause 19 costs where they were also referable to the clause 18 claim. Costs falling into this category, said the costs judge, should be divided in proportion to time spent. These costs came to be described as 'specific common costs' and included the bulk of the costs (brief fees, court time, costs relating to witness statements and other pre-court preparation).
3. That in assessing where the costs relating to "confidential information" lay (this was by far the largest class of costs in issue) it was necessary to have regard to the purpose for which the expenditure was made. The costs judge held that these costs were to be treated as clause 18 costs up to the time of discontinuance and therefore irrecoverable by the claimant and recoverable by the defendant. Following discontinuance these were to be treated as clause 19 costs.

The claimant argued that the costs judge's decision was inconsistent with the approach taken by the Court of Appeal in *Cinema Press Ltd -v- Pictures & Pleasures Ltd [1945] KB 356* which in turn applied the earlier decision of the House of Lords in *Medway Oil and Storage Co Limited -v- Continental Contractors Limited [1929] AC 88, HL*. Under the *Medway Oil* approach the clause 18 claim would have attributed to it only the increase in the costs which it had brought about so that the balance of the costs, which comprised the vast majority of the costs in this action, would be recoverable by the claimant as costs of the action.

Having conducted a thorough review of the authorities Mr Justice Patten concluded that the decision in *Medway* establishes the principle that where one party is awarded the costs of action with the exception of costs relating to a particular matter or issue, the party in whose favour the costs of that issue are awarded, is not entitled to recover anything except the extra costs generated by that issue. Thus the defendant was entitled only to costs solely attributable to the clause 18 claim, but not to costs which were equally attributable to both the clause 18 and 19 claims. Any costs that would have been incurred had only the clause 19 claim had been brought, were required to be treated as costs of the action and not costs referable to the clause 18 issue. The judge rejected the test applied by the costs judge to make the attribution of the confidential information costs to the clause 18 claim, preferring to look at the use to which the evidence was ultimately put. The judge also made it clear that it was not open to the costs judge to disallow the costs of evidence relied on by the claimant on the basis that it was not necessary - unless the trial judge disallowed the costs of a particular issue the costs judge should assume that the evidence called was relevant. In relation to the three rulings the judge held:

1. Non-specific general costs

"...the Master was, I think, wrong to divide what he identified in paragraph 13 of his ruling as general costs. The fact that those costs would have been incurred even if only the cl.19 claim had been brought requires them to be treated as costs of the action and not costs referable to the cl.18 issue."

2. Specific common costs

"The decision in Medway applied in Cinema Press establishes that on a taxation of common costs of the kind that the Master described as specific common costs, it is appropriate to attribute part of the composite fee to the items of work which the fee was intended to cover. In the present case that exercise can be carried out to isolate the proportion of the brief fees paid on both sides to cover work done solely on the cl. 18 claim. The same goes for time spent on preparing parts of witness statements which deal separately and exclusively with that issue. But what the decision in Medway does not do is authorise the taxing master in a case like the present, to apportion the costs of work all of which is relevant to both claims."

3. Confidential Information

"The Master's statement that the costs incurred on witness statements relating to Confidential Annex A was all in support of cl. 18 and not in support of cl.19 is simply incorrect. That was not its sole purpose. As explained earlier, the Particulars of Claim make it clear that Confidential Annex A in its original form was relied on in support of both claims and this remained the position when it was reduced in scale for purposes of the cl. 18 claim, but the contents of Knox (3) and (4) were adduced to support the cl. 19 case. I do not understand or accept the test which Master O'Hare applies in paragraph 17 and 18 in order to make the attribution of the costs to the cl. 18 claim. As he himself records earlier in his ruling, the abandonment of the cl. 18 claim had no impact on the evidence called or the subsequent conduct of the trial. The witnesses who dealt with the full range of Dyson's Confidential Information were deployed in support of the cl. 19 claim and cross-examined extensively with the view to showing that the cl. 18 claim gave the Claimant all the protection it needed. With respect to the Master, it is simply not open to him, in my judgment, to conduct some kind of ex-post facto analysis of what was the minimum amount of evidence needed to support the cl. 19 claim and to disallow the costs of much of the evidence actually used. Unless the trial judge has disallowed the costs of particular witnesses (which he was not asked to do) the Costs Judge should assume that the evidence called was relevant to the claim... the Costs Judge must analyse all the work done and claimed for in accordance with the Medway principle set out".

02

Joseph Lahey -v- Pirelli Tyres Limited [2007] EWCA CIV 91

The effect of CPR 36.13 (1), CPR 36.13 (4) and CPR 44.12 (1) (b) is that upon acceptance of a Part 36 payment a costs order for 100% of the assessed costs is deemed to have been made. A costs judge has no power to vary the costs order that is deemed to have been made.

The claimant suffered a personal injury during the course of his employment by the defendant. The defendant offered £5,000 in settlement before proceedings were commenced, but the offer was rejected. Proceedings were issued and the claim was quantified at approximately £150,000. The claimant rejected a Part 36 payment of £2,000, but subsequently accepted an increased Part 36 payment of £4,000 some 10 months after the claim had been started. The claimant thereby became entitled to his costs up to the date on which he served Notice of Acceptance (CPR 36.13 (1) and (4)).

In due course the claimant served a bill of costs totalling £27,029.63. This figure included solicitors' base profit costs of £11,487 as well as a 75% success fee.

The defendant argued, amongst other things, that the solicitors' costs were disproportionate to the settlement figure of £4,000 and at the outset of the hearing asked the judge to order that the claimant should be awarded only 25% of assessed costs, before proceeding with the detailed assessment. The judge rejected the defendant's argument that CPR 44.3 (and possibly CPR 44.4, CPR 44.5 and CPR 44.14) conferred the necessary jurisdiction on the costs judge to make such an order. The bill of costs was assessed at £15,182.71 inclusive of VAT. The defendant's subsequent appeal, heard by His Honour Judge Appleton, was dismissed. Brooke LJ gave permission to appeal to the Court of Appeal.

The Court of Appeal held, dismissing the appeal, that the effect of CPR 36.13 (1) and (4) and CPR 44.12 (1) (b) was that upon acceptance of the Part 36 payment, "a costs order [was] deemed to have been made on the standard basis". This meant that the claimant was entitled to 100% of the assessed costs. The court looked at CPR 3.1 (7) which gives the court the power to vary or revoke an order but found that that power was only exercisable in relation to an order that a court has previously made, and not in relation to an order that is deemed to be made by operation of the rules. The court recognised that CPR 44.3 gives a judge jurisdiction to make an order *in advance of the assessment* that the receiving party will only receive a certain percentage of the assessed costs. In such cases a judge is not varying an order; he is simply making the order for costs. In contrast, when carrying out a detailed assessment the costs judge is not making an order for costs – his position is quite different from that of a judge exercising the jurisdiction given by CPR 44.3. Having concluded that the costs judge has no power to vary the costs order deemed to have been made the court went on to say that it was in fact quite unnecessary to give the costs judge the jurisdiction argued for as in an appropriate case a he can disallow entire sections of a bill of costs. Lord Justice Dyson gave a couple of obvious examples, as follows:

"If the costs judge considers that the claimant acted unreasonably in refusing an offer to settle made before proceedings were issued, he is entitled to disallow all the costs post-issue on the footing that they were costs "unreasonably incurred": Rule 44.4 (1). Similarly, where he decides that a party was unreasonable to raise and pursue an issue, the costs judge is entitled to disallow the costs relating to that issue on the grounds that they were unreasonably incurred".

Curiously, in this case the defendants did not submit in the course of the detailed assessment that the claimant should not have any of the post-issue costs because he had acted unreasonably in not accepting an initial offer of £5,000 (made before proceedings were issued), nor did they submit that the claimant should not have any of the costs relating to a significant segment of the claim that was ultimately abandoned.

03

**National Westminster
Bank Plc - and - (1)
Thomas James
Feeney, (2) Linda
Catherine Feeney
(unreported) 14 May
2007, Eady J**

The court held that as a matter of general principle mediation costs would form part of the costs of action, however in this case the Tomlin Order did not override the costs provision in the Mediation Agreement.

The Bank and the Feeneys entered into a Mediation Agreement through the Centre for Effective Dispute Resolution (“CEDR Solve”). The parties agreed to CEDR Solve’s standard terms and conditions, which included the following provision:

“Fees, expenses and costs

21. *CEDR Solve’s fees (which include the mediator’s fees) and the other expenses of the mediation will be borne equally by the parties. Payment of these fees and expenses will be made to CEDR Solve in accordance with its fee schedule and terms and conditions of business.*

22. *Each party will bear its own costs and expenses of its participation in the mediation”.*

Guidance notes attached to the agreement provided:

“Fees, expenses and costs – paragraphs 21-22

The usual arrangement is for the Parties to share equally the fees and expenses of the procedure, but other arrangements are possible. A Party to a dispute, which is reluctant to participate in mediation, may be persuaded to participate if the other Party(ies) agree to bear that Party’s expenses. Parties may also amend the agreement to identify that the costs of mediation may be taken into account in any court orders if there is no settlement at the mediation”.

The court held that the costs judge (Master Campbell – [2006] EWHC 90066 (Costs)) was correct in his finding that mediation costs are in principle recoverable as costs of action. They are covered by Section 4.6 of the Costs Practice Direction to CPR 43 which sets out items that may be included in a bill of costs, including at sub paragraph (a):

“Work done in connection with negotiations with a view to a settlement...”.

Therefore, the Bank could not have avoided liability for mediation costs had the Mediation Agreement been silent as to how they should be met. However in this case the Mediation Agreement clearly indicated that the parties intended that they would each meet their own costs of participating in the mediation irrespective of the outcome, unless they agreed to amend the Mediation Agreement. The Tomlin Order did not override the Mediation Agreement. In order to cover the costs of the mediation specific mention needed to be made in the Tomlin Order (as was the case in relation to various interlocutory costs orders made in favour of the Bank).

04

David Truex, solicitor (a firm) -v- Simone Kitchin [2007] EWCA Civ 618

The court emphasised the importance of a solicitor's duty to consider and advise the client on the availability of legal aid.

The appellant carried out approximately £21,000 worth of work on the respondent's instructions. The respondent had paid £9,000 on account. The appellant brought a claim for professional fees, however the respondent denied liability and counterclaimed for all money she had paid on account, alleging that the solicitor had been negligent for failing to advise her that she might be eligible for public funding.

The court considered the Guide to the Professional Conduct of Solicitors, which was then in force, and provided:

"5.01 A solicitor is under a duty to consider and advise the client on the availability of legal aid where the client might be entitled to assistance under the Legal Aid Act 1988".

The court also considered the Family Law Protocol, which sets out best practice for solicitors (and with which advanced members of the Family Law Accreditation Scheme (FLAS) are expected to comply) which provides:

"Availability of Public Funding

2.3 Solicitors are reminded of their professional duty to consider and advise clients on the availability of public funding, where clients might be entitled to such assistance. Accordingly, the solicitor should be aware of the levels of eligibility for public funding.

2.5 If clients who may be eligible for public funding, either at the outset of a case or at any time during it have consulted solicitors who do not undertake publicly funded work, they must be given the option of being referred to solicitors who do carry out publicly funded work (even if this means referring clients to another firm)...".

The appellant argued that no reasonable solicitor would have formed the view that the respondent might be eligible for legal aid, in particular as the respondent had indicated at the outset that a dividend of £100,000 had been paid by a company jointly owned by the client and her husband. However, the court found that the so-called dividend had to be assessed in context, and it was relevant that the respondent informed the solicitor at the outset that she would be borrowing money from her parents to meet the costs, that she had no money of her own and that she had no knowledge of the company's finances. The court emphasised that a solicitor is bound at the outset to consider the question whether a client might be eligible for legal aid and in this case given the solicitor's knowledge of the respondent's circumstances the question of public funding could only have been ignored if inquiries of the respondent revealed assets which put public funding out of the question. The appeal was dismissed.

05

SES Contracting Limited -v- UK Coal Plc & others [2007] EWCA Civ 791

This was an appeal against an order requiring the appellants to pay the respondents their costs of a successful application for disclosure made before the commencement of proceedings under CPR 31.16.

The appellants, UK Coal Plc, UK Coalmining Limited, Centechnology (UK) Limited and Mr Mark Weston (collectively “UK Coal”), appealed against an order requiring them to pay the respondents their costs of a successful application for disclosure before the commencement of proceedings under CPR 31.16.

SES tendered for a contract for specialist tunnelling services. The contract was awarded by UK Coal to one of its subsidiaries, Centech, in circumstances which made SES very suspicious about the manner in which the tender had been conducted. SES initially sought disclosure of documents in the possession of UK Coal under the principles set out in *Norwich Pharmacal -v- Commissioners of Customs & Excise [1974]AC 133*. SES subsequently obtained copies of emails which confirmed their suspicions about the manner in which Centech had obtained the contract and which provided grounds for the view that Mr Weston had colluded with UK Coal whilst still employed by SES with a view to stealing SES’s business. The emails also provided grounds for thinking that SES might have a claim against UK Coal itself, although the position was not entirely clear. Thus SES made an application for pre-action disclosure under CPR 31.16.

At the end of a three day trial the judge was satisfied that SES had met all of the requirements of CPR 31.16(3) and ordered the disclosure by UK Coal and Mr. Weston of various categories of documents. Departing from the general rule set out in CPR 48.1 (that the applicant will pay the costs of a pre-action disclosure application), the judge ordered that UK Coal should pay the costs of the application. Whilst the judge did not go so far as to suggest that it was unreasonable for the defendants to have opposed the application, he was critical of the way in which they went about it. The defendants had, he said, produced ‘...a wall of witness statements that looked impressive and intimidating.’ but declined to support their case with any contemporaneous documents that might have allayed the applicant’s concerns.

The appeal court emphasised that by laying down a general rule that a defendant to an application for pre-action disclosure will be awarded his costs, CPR 48.1(2) implicitly recognised that it will not usually be unreasonable for the defendant to require the applicant to satisfy the court that he ought to be granted the relief that he sought. The rule provides a departure point for a judge dealing with costs on an application of this kind. The real question, said the appeal court, is whether the defendant had acted unreasonably in opposing the application, and if not, whether his conduct was capable of justifying the order made.

The appeal court concurred with the judge in the view that it was not unreasonable of the defendants to oppose the application, which was by no means of a routine nature. Therefore, the defendants were entitled to decide on what basis and with what evidence they would oppose the application, provided that their approach was not wholly unreasonable and did not unnecessarily increase the costs. In the present case it was clear that the judge did think that the defendants had behaved unreasonably in the manner of their opposition – the approach of UK Coal added to the costs of preparation and prolonged the hearing without putting forward objective evidence. However, whilst the judge had referred to CPR 48.1 (2) at the outset of his judgment he did not appear to have fully appreciated its significance or considered what kind of conduct would justify the court in going so far as to order the defendants to pay the whole of the costs. The judge did not, for example, appear to have considered that much of the applicant’s costs would most likely have been incurred in any event, regardless of the manner of the defendants’ opposition. Whilst the appeal court agreed that there was ample evidence to justify departure from the general rule, this was not a case where it could be said that it was unreasonable to oppose the application or where the manner of that opposition was so unreasonable so as to require the defendants to bear the whole of the costs. The appeal court set aside the order and substituted a no order for costs.

06

PR Records Limited -v- Vinyl 2000 Limited and another [2007] EWHC 1721 (Ch)

The court considered the nature of the inquiry which a court should undertake on an application to add a party to an action pursuant to CPR 48.2 (1) (a) for the purpose of seeking a non-party costs order under Section 51 (3) of the Supreme Court Act 1981 and CPR 48.1.

07

Utting -v- McBain [2007] EWHC 90085 (costs)

The failure to state the deferment element of the success fee, even if it is zero percent, can constitute a material breach of the Conditional Fee Agreement Regulations 2000 section 3(1) (b) so as to render the CFA unenforceable.

The appellant company appealed against a decision dismissing its application for an order joining the respondent non-party to an action pursuant to CPR 48.2 (1) (a), and for a non-party costs order against the respondent non-party in relation to costs incurred when he was not a party to the proceedings.

Mr Owlett was a director and 50% shareholder in the defendant company (Vinyl 2000 Limited), which was sued by the claimant (PR Records Limited) successfully.

On the question of the test to be applied on an application for joinder under CPR 48.2 Mr Justice Morgan found (following *Dranetz Anstalt –v- Hayek*) that it was not appropriate for there to be a preliminary hearing on the merits in order to see whether the application for a non-party costs order had a real prospect of success. The applicant would normally be expected to explain the nature of the case against the intended party and the purpose to be served by joining that party. If the applicant could not explain its claim against the intended party or could not say what purpose would be served by joining the intended party, then the court might well dismiss the application. If it was clear that a joinder of the intended party was an abuse of process the application would be likely to be dismissed. However, if the intended party denied that there was any proper claim against him, ordinarily the way for such a contention to be contested would be to join the proposed defendant and try the issue.

Where a client might be left genuinely uncertain as to his liability for costs, that was a form of prejudice that the CFAR 2000 were designed to prevent. In this case the materiality test could not save the CFA. Whether the breach had a prejudicial effect on the client is not the determinative factor in assessing whether the breach was material (*Garrett -v- Halton BC [2006] EWCA Civ 1017 applied*). The failure to mention the level of the postponement charge was one of substantial compliance which had an adverse effect on the protection afforded to Mr Utting and on the proper administration of justice. All of the base costs and the success fee claimed in parts 2, 3 and 4 of the claimant's bill of costs (covering the CFA period), amounting to £38,632.15, were disallowed.

08

**Nicholas Crane
-v- Canons Leisure
Centre [2007] EWCA
Vic 1352**

Work done by independent costs consultants is “solicitors’ work” and can attract the same level of success fee as is allowed for work done in the substantive action.

The claimant’s personal injury claim for receiving an electric shock to his hand at work was compromised in August 2004 for an agreed payment of £1,500 plus costs to be assessed on the standard basis. The claimant’s union had entered into a collective conditional fee agreement with Rowley Ashworth. Rowley Ashworth engaged costs consultants, Costings Limited, to conduct the detailed assessment of the claimant’s costs.

The Costs Officer reduced the claimant’s bill of costs from something in excess of £9,500 to about £6,500. The costs of the detailed assessment were allowed at £3,860.85 including a success fee of 45%. On appeal Master Wright disallowed the success fee on the costs of detailed assessment and reduced the costs to £2,930.51. The claimant appealed against Master Wright’s decision that the costs of the independent costs consultants were disbursements and as such did not attract a success fee.

The court found that the work carried out by the independent cost consultants was undoubtedly solicitors’ work – it was the type of work that the solicitors were retained to do. If the solicitors properly chose to delegate that work, they nonetheless remained entitled to charge on their account and the proper amount of the charge is not necessarily the same as the amount which they agreed to pay their sub-contractor. The classification of the work, held the court of appeal, cannot sensibly depend on whether the solicitors do the work themselves, whether they delegate it to another solicitor or whether they delegate it to costs draftsmen who are not solicitors. Nor, held Lord Justice May is there any “...reason of principle which compels the court to require parties who enter into CFAs to address at the outset the risk of costs proceedings separately...”. The success fee for the costs proceedings was allowed at the same level as in the underlying personal injuries action.

09

**(1) Carl Harris (2)
Susan Collete
Hartless -v- Moat
Housing Group South
Limited [2007] EWHC
3092 (QB)**

Where a party is entitled to his costs, he must include all of his costs in the bill for detailed assessment. If he fails to include the costs of his previous solicitor, and the costs judge completes the final certificate, he cannot claim a further assessment.

The appellants appealed against the decision of a costs judge (Master Haworth) to disallow a second bill of costs served on behalf of the claimants pursuant to an order for detailed assessment. The claimants had been represented by two firms of solicitors, having transferred instructions to the second firm when they were granted public funding. The first and second solicitors agreed that they would submit separate bills of costs, but omitted to inform the defendant's solicitors of that fact. The second solicitors then served a bill of costs which did not include the first solicitors' costs. The second solicitors' claim for costs was settled through negotiation. After that agreement had been reached, the first solicitors served their bill of costs seeking a further £53,000. The costs judge struck out the first solicitors' bill of costs. He considered *Hyman and Teff -v- Segalov* [1952] P241 as still good and binding authority. In that case the Judge (Wallington J) said:

"I am clearly of the opinion that the Plaintiffs having submitted and obtained taxation – and incidentally payment – of their costs of action, were not entitled to tax as between party and party any further bills. It appears to me to be quite clear that a litigant in possession of a judgment against an opposite party to pay his taxed costs must lodge a bill for taxation which includes all the costs to payment of which when taxed the judgment entitles him. He is not, in my opinion, entitled to select a portion of the costs, submit that portion for taxation as his costs of the action recoverable under the judgment, and, after claiming an allocatur, make a selection of a further part of his costs and successfully apply for taxation of a bill for those further items as between party and party. Nor is he, having obtained taxation, entitled to an order to pay the amount of the allocatur".

The appellants submitted that whilst CPR 47 and CPR PD 47 envisaged that only one notice of commencement and one bill of costs would be served, there was nothing that stipulated that must be so. They argued that although the bill had not been divided into separate parts for each solicitor, as is required by CPR 47, that should not lead to the automatic disallowance of the costs when other less draconian penalties are available. The appeal court (Christopher Clarke J) dismissed the appeal and said:

"The rules clearly provide that detailed assessment proceedings are commenced by the receiving party serving both a notice of commencement and the (not a) bill of costs. The bill is the receiving party's statement of what he claims is due to him pursuant to whatever order entitles him to costs. If the receiving party is entitled to recover its costs of instructing more than one solicitor the Practice Direction requires him to include the costs of each solicitor separately in the bill. If he fails to include the costs of his previous solicitor, and the costs judge completes his assessment of the costs without regard to the previous solicitor's costs and proceeds to a final certificate, the receiving party cannot claim a further assessment".

10

Roger Barlow -v- Lucy Ewart Perks [2007] EWHC 90087 (costs)

A Conditional Fee Agreement was found to be unenforceable as there had been material non-compliance with Regulation 4 of the Conditional Fee Agreement Regulations 2000 which had adversely effected both the client's position and the administration of justice generally.

The claimant instructed KSB Claims pursuant to a retainer dated May 2001, in relation to his personal injuries claim. KSB Claims had been appointed by the claimant's motor insurers to act on his behalf. The claimant enjoyed the benefit of BTE insurance with Motor Law so long as he was represented by KSB Claims. KSB Claims ceased to carry out personal injury work apart from one-off claims and the claimant's file was transferred to Messrs Irwin Mitchell in July 2004. It was not possible for the benefit of the policy to be passed to Messrs Irwin Mitchell when they took over the case although the claimant was not informed of this in terms. The claimant was very persistent in trying to continue to receive the benefit of the BTE policy; however the new solicitors failed to inform him that it might be possible to find another firm of solicitors who could deal with the case under the BTE policy because they were on the motor insurer's panel. In the circumstances the new solicitors informed the claimant that he could either fund the claim himself or enter into a CFA (the solicitors had consulted the Law Society as to whether it was appropriate to offer the claimant a CFA). Ultimately, the claimant entered into a CFA with the new solicitors and after the case settled applied for a detailed assessment of costs. The defendant challenged the validity of the CFA.

The court held that the claimant's second solicitors had failed to comply with Regulation 4 of the Conditional Fee Agreement Regulations 2000 because they did not properly inform the claimant about the availability of insurance and other methods of financing the costs. In particular, the real reasons for the claimant not being able to continue with the BTE policy were not given to him and so he was not given the opportunity to consider his position. Thus, the court concluded, there had been material non-compliance with Regulation 4 which had adversely effected both the client's position and the administration of justice generally.

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Monsanto Technology Llc -v- (1) Cargill International SA, (2) Cargill Plc [2007] EWHC 3113 (Pat)

The Judge (Pumfrey LJ) articulated the approach to be taken by the courts in relation to costs where the overall winner has been unsuccessful on a particular issue.

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Shirley Jackson (Trustee in Bankruptcy of Subhash Kanji Thakrar) and 5 others -v- Subhash Kanji Thakrar (a bankrupt) And 13 Others [2007] EWHC 626 (TCC)

The court had to determine costs arising out of a patent action in which the claimants had been largely successful but had failed on the issue of validity on one of its claims and, in relation to infringement, had failed on a relatively short issue of construction (regarding the meaning of the word “isolated”). Monsanto’s costs were £2.2M, Cargill’s costs were £1.9M. The Judge (Pumfrey LJ) articulated the approach to be taken by the courts in relation to costs where the overall winner has been unsuccessful on a particular issue. The Judge made a number of points:

1. Until the CPR came into effect the court exercised general control on costs in patent litigation by the process of certification which prevented costs from being allowed unless the court had certified that the issues raised had been proved or were reasonable and proper. Since the requirement for certification was abolished by the CPR costs in patent actions are to be allowed or disallowed on the same basis as any other litigation.
2. The court is obliged to identify the overall winner and the overall winner is likely (save in exceptional circumstances) to be entitled to payment of all costs which cannot be allocated to a particular issue (referred to by the Judge as “general costs of the action”).
3. In relation to costs that can be allocated to issues on which the overall winner has nevertheless lost, two questions have to be asked – (1) Should the overall winner nonetheless recover his costs of that issue?, and (2) Should he pay the otherwise unsuccessful party part of the costs incurred in respect of that issue?
4. In relation to the second question (above) the court should have regard not only to the reasonableness or otherwise of raising the issue in the first place, but also whether there was something more than conduct justifying his being deprived of the costs of the issue in all the circumstances. The further one moves away from the general rule that the unsuccessful party will be ordered to pay the costs of the successful party, an increasingly strong justification will be required.
5. Where it is justified to order the overall winner to pay the costs of a particular issue it is often convenient to treat both parties’ costs of that issue as being equal and to double the deduction. So if the costs of the issue is equal to 15% of the overall winner’s total costs, he will be deducted 30% of his total costs if the court concluded that he should pay the costs of that issue to the other side.

The relevant test of causation in an application to join a non-party funder of litigation costs proceedings under the Supreme Court Act 1981 Section 51 was whether or not the funding provided by the non-party caused an applicant to incur costs that he or she would not otherwise have incurred.

Other developments

New Court Fees From October 2007

Set out right are the court fees for the various stages of the detailed assessment process. Please note that the fee payable on lodging a bill of costs for an inter partes or solicitor-client assessment is now based on the profit costs element of the costs claim.

| Court fees from October 2007 | SCCO | County Court |
|--|-----------|--------------|
| On the filing of a request for detailed assessment where the party filing the request is legally aided or is funded by the LSC and no other party is ordered to pay the costs of the proceedings. | £120.00 | £105.00 |
| On the filing of a request for detailed assessment in any case where the above fee does not apply; or on the filing of a request for a hearing date for the assessment of costs payable to a solicitor by his client pursuant to an order under Part III of the Solicitors Act 1974. | | |
| Where the amount of the costs to be assessed (excluding VAT & disbursements): | | |
| (a) does not exceed £15,000 | £300.00 | |
| (b) exceeds £15,000 but does not exceed £50,000 | £600.00 | |
| (c) exceeds £50,000 but does not exceed £100,000 | £900.00 | |
| (d) exceeds £100,000 but does not exceed £150,000 | £1,200.00 | |
| (e) exceeds £150,000 but does not exceed £200,000 | £1,500.00 | |
| (f) exceeds £200,000 but does not exceed £300,000 | £2,250.00 | |
| (g) exceeds £300,000 but does not exceed £500,000 | £3,750.00 | |
| (h) exceeds £500,000 | £5,000.00 | |
| On a request for the issue of a default costs certificate. | £50.00 | £45.00 |
| On an appeal against a decision made in detailed assessment proceedings. | £200.00 | £105.00 |
| On applying for the court's approval of a certificate of costs payable from the Community Legal Service Fund. | £50.00 | £35.00 |
| On a request or application to set aside a default costs certificate. | £100.00 | £65.00 |

Other recent cases

Hall and Ors -v- Stone [2007] EWCA Civ 1354

The appellants appealed against an order awarding 60% of their costs. The appellants had recovered, in a multi track case, sums at the small track level. The Court of Appeal held that the judge had erred in his approach when deciding who was the successful party. The judge was wrong to have taken early offers into account (these had been made before medical reports were available and were not held open until after sufficient medical evidence had been obtained). The defendant had lost on the principal issue of fraud and had failed to make a Part 36 payment. The defendant did not achieve any partial success that should entitle her to an abatement of costs. In contrast, the appellants had succeeded on the fraud issue and had recovered damages. The appellants were for all intents and purposes the successful party and should not suffer a reduction in costs because they had rejected offers that had been made too early and which had not been held open until medical evidence had been obtained. Nor could the judge reduce the costs of the successful party under CPR 44.3 (4) merely because they had not done as well as they had hoped.

Mastercigars Direct Limited -v- Withers LLP [2007] EWHC 2733 (Ch)

A solicitor's retainer is subject to the Supply of Goods and Services Act 1982 s.15 and it is therefore an implied term that the solicitor will be paid reasonable remuneration for his services. The contractual promise to update the costs estimate is not a condition precedent to the solicitor recovering any sums in excess of the sum set out in the estimate. The estimate is a useful yardstick by which to measure the reasonableness of the sums claimed and the greater the difference between the estimate and the final bill the more that calls for an explanation. The relevant question is what in all the circumstances is it reasonable for the client to be expected to pay – Wong -v- Vizards. Leigh -v- Michelin and Garbutt -v- Edwards do not suggest that a solicitor has any kind of automatic entitlement to add a margin to the estimate, nor are they authority for the proposition that the client can cap his liability at the estimated sum plus a margin. It is not an implied term of the contract of retainer that a solicitor has to comply with the Solicitors' Costs Information and Client Care Code.

A full report on this very important decision will appear in the next edition of the DeNovo Newsletter.

DeNovo News

On 1 January 2007 the Association of Law Costs Draftsmen became an authorised body for the purposes of sections 27 and 28 of the Courts and Legal Services Act 1990, under which an authorised body can grant rights of audience and the right to conduct litigation.

In August 2007 Afqar Dean (Director, DeNovo) became one of the first costs consultants to be granted rights of audience.

About us

DeNovo (London) Limited is now one of the leading specialist costs consultancies in the South East. We are proud of the reputation and long term relationships we have built with our clients and contacts over the years. Our continuing growth ensures our capacity to cover all areas of costs practice and we have the personnel, experience and resources to deliver a quality service in a personal and client-directed manner.

We are always happy to discuss implementing a comprehensive costs management service for your practice. We aim to add value to our clients' businesses by helping them to reach their financial goals through effective costs management and planning.

Our senior consultants have been in business for more than 15 years. We provide a personal service and in these days of advanced technology we still strive to get to know our clients. Whatever business you transact with us we can assure you of our personal attention and we would be delighted to meet with you to discuss your particular needs.

Where to find us



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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DeNovo London Limited
60 Lombard Street, London, EC3V 9EA
T +44 (0)20 3170 8985 F +44 (0)20 3170 8986
info@denovolaw.co.uk www.denovolaw.co.uk