

# NEWSLETTER

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## FEATURED CASES

- 01 Tracy Reynolds -and- Stone Rowe Brewer (A Firm) [2008] EWHC 497(QB): solicitors' costs were limited to the amount of their original estimate plus a margin.
- 02 Lisa Carver -v- BAA Plc [2008] EWCA Civ 412: the court considered the change in language of CPR Part 36 effected by the Civil Procedure (Amendment No. 3) Rules 2006.
- 03 Kilby -v- Gawith [2008] EWCA Civ 812: the court considered rules concerning the amount of the fixed success fee under the fixed recoverable costs regime.
- 04 Gloucestershire County Council -v- Evans & Others [2008] EWCA Civ 21: whether the lawfulness of the percentage increase allowed under a CFA is measured by reference to the costs at risk.

## IN BRIEF

Zoran Kostic -v- (1) Malcolm Chaplin, (2) Martin Saunders, (3) Attorney General [2007] EWHC 2909 (Ch): the court restated long accepted exceptions in contentious probate matters to the general rule that costs should follow the event.

Research in Motion UK Limited -v- Visto Corporation [2008] EWHC 819 (Pat).

## OTHER NEWS

2008 SCCO guideline rates.  
Senior Judge to review costs system.

## Welcome to the summer 2008 edition of the DeNovo newsletter.

In response to overwhelming positive feedback received in relation to previous editions of the DeNovo newsletter and to the need to reduce our carbon footprint we have decided to make this the last printed edition of the Newsletter. Our popular costs case summaries will henceforth be available on our website, which we have adapted to include a fully searchable costs database. As a result our costs reports will be available much more rapidly. If you would like to be alerted to costs cases as they come through then please let us know. Future editions of the DeNovo newsletter will also be available through our website, free of charge and downloadable in the pdf format. We anticipate that our costs cases database will include about 200 cases by the end of the year, spanning the period 2001 to date. We are very happy for you to link directly to our website through your firm's Intranet system. If this is something that would be of interest then please ask your professional support lawyer to contact us.

In the last edition we promised a full report on the important decision in Mastercigars Direct Limited -v- Withers LLP, where Morgan J, contrary to the advice of both of his assessors, allowed Withers' appeal against a Costs Judge's decision that they should be bound by an estimate given to their client. The full report will shortly appear on our on-line costs database (we are waiting to hear the result of the client's oral application for permission to appeal the judgment). We have summarised in this edition a more recent case which addressed the same thorny question - Reynolds -v- Stone Rowe Brewer. This is an interesting case because although the ratio is consistent with the Mastercigars decision, the result was somewhat surprising as the solicitors were ultimately held to the inadequate estimate plus a margin. The clear message, from both decisions, is that solicitors need more than ever to be extremely cautious when giving costs estimates. Another interesting decision featured in this edition is that of The Court of Appeal (Lord Justice Ward) in Carver -v- BAA where the court considered the implications of the change in language of CPR Part 36, effected by the Civil Procedure (Amendment No. 3) Rules 2006.

Michael Heslin, August 2008

# 01

## Tracy Reynolds - and - Stone Rowe Brewer (A Firm) [2008] EWHC 497(QB)

Tugendhat J upheld Master Rogers's decision that the client's liability to his solicitors should be limited to the amount of their original costs estimate plus a 15% margin. The Master was entitled to conclude that had the claimant been given a different, correct estimate at the outset she might not have acted as she did.

Master Rogers assessed the defendant solicitors' costs at circa £36,000 and ordered that they should repay an overpayment of £14,000. The defendant appealed against the Costs Judge's decision to limit their charges to the amount of their original estimate plus a margin of 15%, and also his decision to limit Counsel's and expert's fees to the estimates given.

The claimant instructed the defendant to represent her in relation to her dispute with a building contractor that she had employed to refurbish her property. The defendant provided her with an estimate of costs at an early stage, in December 2004, which put the cost of taking the matter through to trial at between £10,000 and £18,000 plus VAT. Following the preparation of the defence and counter claim the defendant wrote in May 2005 regarding costs, indicating that costs through to trial were likely to run to £10,000 to £15,000 plus VAT. In June 2005, following correspondence from the claimant, in which she expressed her shock at the level of costs by then incurred, the defendant again wrote and said that the costs to trial were likely to run to between £10,000 and £15,000 plus VAT. By November 2005, invoiced costs had run to in excess of £14,000 and on 29 November 2005 the defendant issued a revised estimate to trial of between £25,000 and £30,000 plus VAT, which was confirmed at a meeting on 1 December 2005. That estimate was confirmed in February 2006, but increased at the end of March 2006 to between £35,000 and £40,000 plus VAT. By 30 June 2006, costs had run to in excess of £50,000 and the estimate was further revised. The solicitors explained that the case had been particularly costly because of the contractor's conduct and also because of the demands of the client herself (they referred to the large volume of detailed correspondence). The estimate was increased again on 31 August 2006 to £55,000 plus VAT. By September 2006 the running total had risen to just under £60,000 of which in excess of £25,000 remained outstanding. The solicitors refused to act further and new solicitors were instructed. The claimant succeeded on all elements of her counter claim and was awarded damages of in excess of £55,000. In all, the claimant incurred about £90,000 in costs (£60,000 charged by the defendant, an additional £30,000 charged by the solicitors who acted at the trial).

The costs judge said that the solicitors should be bound by the estimate of £18,000, to which he added a 15% margin which he said was available under established case law, *Wong -v- Vizards* [1997] 2 Costs LR 46 QB. On appeal the solicitors argued that the judge had erred in failing to take into account that the whole point of the revised estimate had been to advise the client in advance of the costs being incurred that the original limit of £18,000 was going to be exceeded, also that he was wrong to treat the estimate as a fixed quotation. The costs judge's decision was made before the judgment in *Mastercigars Direct Limited -v- Withers LLP* [2007] EWHC 2733 where the court concluded that the authorities including *Wong* do not suggest that a solicitor has any kind of automatic entitlement to add a margin to the estimate, neither are they authority for the proposition that the client can cap his liability at the estimated sum plus a margin.

Applying the *Mastercigars* principles, Tugendhat J held that the costs judge had asked himself the correct question - what in all the circumstances is it reasonable for the client to be expected to pay? In answering this question the costs judge was entitled to have regard to the estimates, and did so to the extent that he held that the solicitors should be bound by them. The revised estimate had been an attempt to correct an earlier under-estimate and was not attributable to any change in the facts and the costs judge was entitled to come to the view that had a correct estimate been given at the outset the claimant would probably not have pursued the litigation.

# 02

## Lisa Carver -v- BAA Plc [2008] EWCA Civ 412

The court considered the change in language of CPR Part 36 effected by the Civil Procedure

(Amendment No. 3) Rules 2006. The court of appeal held that where a claimant had obtained judgment on liability and had been awarded damages in excess of a payment into court, the judge was nonetheless entitled to award costs in favour of the losing party or to make an order for costs.

Miss Carver was an air hostess who had suffered a personal injury at work when using a faulty lift at Gatwick Airport on 31 March 2003. BAA, the body responsible for the safety of the airport, conceded liability and made what was termed a “Part 36 offer” in the total sum of £4,006 on 17 November 2005. On 6 June 2006 the defendant made a Part 36 payment into court in the sum of £4,000, which in addition to an earlier interim payment made a total offer of £4,520. The case went to trial and the claimant was awarded a total of £4,686.26 inclusive of interest, which was just £51 in excess of the combined total of the interim payment and payment into court when interest on those payments was taken into account. The claimant’s solicitors indicated that they would be seeking costs in the region of £80,000 plus VAT. Judge Knight QC ordered the claimant to pay BAA’s costs after the expiry of the time for acceptance of the payment into court, and made no order as to costs for the period covered by the earlier Calderbank offer.

Although the amended Rule came into effect 10 months after the payment into court, it was common ground that the new Rule governed the outcome of the case (a clear consequence of the transitional provisions enacted by the Civil Procedure (Amendment No. 3) Rules 2006). Prior to the amendment CPR Part 36 distinguished between Part 36 payments into court and Part 36 offers to settle so that an offer to settle a money claim would not have the costs consequences set out in Part 36 unless it was made by way of a Part 36 payment. It was generally accepted practice that beating the payment into court by as little as £1 meant that the claimant had done better than the payment into court. Since the Rule change payment into court no longer plays any role in the Part 36 offer to settle procedure.

The question for the court of appeal was whether the change in the language of Part 36 should result in a change of approach. Finding that Judge Knight had been correct to look at the case broadly and that he was entitled to take into account that the extra £51 gained was more than offset by the recoverable costs incurred by the claimant in continuing to contest the case, Lord Justice Ward said:

“...the purpose of the amendment was to replace the old system of payment in with offers to settle and to apply the same costs consequences irrespective of whether the offer was for the payment of a sum of money in a money claim or an offer in terms and conditions on which to settle non-money claims. The previous practice for the latter – the “more advantageous” approach – became the uniform approach for both. For money claims as well as for non-money claims the same questions arise under CPR 36 14(1) namely (a) whether the judgment is “more advantageous” than the offer and under (b) whether the judgment is “at least as advantageous” as the offer.

It is quite clear that in non-money claims where there is no yardstick of pounds and pence by which to make the comparison, all the circumstances of the case have to be taken into account. Why, therefore, should the rule be different where a money claim is involved?” and “...in the context of the new Part 36, where money claims and non-money claims are to be treated in the same way, “more advantageous” is as Rix LJ observed in the course of argument, “an open-textured” phrase. It permits a more wide ranging review of all the facts and circumstances of the case in deciding whether the judgment, which is the fruit of the litigation, was worth the fight.”

Thus the claimant failed in her appeal on the grounds that since she had done better than the payment in, the result was “more advantageous”, and there was no reason to apply CPR Rule 36.14 against her.

# 03

## Kilby -v- Gawith [2008] EWCA Civ 812

The appeal concerned the fixed recoverable costs regime under Section II of CPR Part 45. In particular, the court of appeal considered the meaning of CPR Rule 45.11(1).

In costs only proceedings following the settlement of a low value road traffic claim the defendant submitted that it was unreasonable for the claimant to have entered into a conditional fee agreement with her solicitors because she already had before-the-event insurance which would have been sufficient to cover her solicitors' fees without risk, and that the court had a discretion whether or not to allow a success fee. The Costs Judge held that CPR Rule 45.11(2), which provided for a fixed recoverable success fee of 12.5%, was not discretionary. A District Judge dismissed the defendant's appeal. The court of appeal found that although CPR 45.11(1) provides that "a claimant may recover a success fee" if he has entered into a specific type of arrangement, the natural meaning of that paragraph is that once the pre-conditions have been satisfied the claimant is entitled to recover a success fee. Sir Anthony Clarke MR said *"just as the expression "the claimant may recover damages" means that he has the right to recover damages, so, as I see it, does the expression "the claimant may recover a success fee" mean that he has a right to recover the success fee, provided of course that the condition precedent is satisfied."*

Further, the court held that once a claimant is entitled to claim a success fee, CPR Rule 45.11(2) provided that the amount of the success fee "shall be" 12.5%, which meant that where a success fee was recovered it had to be 12.5%.

# 04

## Gloucestershire County Council -v- Evans & Others [2008] EWCA Civ 21

The lawfulness of the percentage increase allowed under a CFA is measured not by reference to the costs at risk, but by reference to the fees that would have been payable if the CFA was not a CFA.

A Conditional Fee Agreement provided for a success fee of 100% on the basic charge of £145 per hour and for a discounted charge of £95 per hour to be paid if the claimant local authority lost the case. The local authority won its claim against the first and fourth defendants within the meaning of the CFA. In the course of the ensuing detailed assessment of costs the solicitors argued that they were thus entitled to be reimbursed at the rate of £145 per hour in respect of their basic charges plus a success fee of 100%, a total rate of £290 per hour. The paying party argued that the success fee provided for by the agreement exceeded the maximum permitted by Section 58(4)(b) of the Courts & Legal Services Act 1990 and that the agreement was therefore unenforceable so that no profit costs would be recoverable between the solicitor and client and, by application of the indemnity principle, from the defendant by the claimant. The maximum success fee permitted by Section 58(4)(c) was 100%.

The defendant's case was that as the agreement provided for an hourly rate of £95 come what may, the solicitors were at risk to the extent of no more than £50 per hour and for that risk the solicitors were awarded a success fee of 290% (£50 x 290% = £145), impermissible under Section 58(4)(c). The court of appeal considered the correct interpretation of Section 58(2)(b) and held that it should be read as follows - that "A Conditional Fee Agreement provides for a success fee if it [the CFA] provides for the amount of any fees to which it [the CFA] applies to be increased, in specified circumstances, above the amount which would be payable if it [the amount of fees to which the success fee is applied] were not payable only in specified circumstances". The court also said that the concept of "costs at risk" does not find expression in Section 58(2)(b) and forms no part of the definition of a CFA which provides for a success fee.

## Brief Reports

**Zoran Kostic -v- (1)  
Malcolm Chaplin, (2)  
Martin Saunders, (3)  
Attorney General  
[2007] EWHC 2909 (Ch)**

**Research in Motion  
UK Limited -v- Visto  
Corporation [2008]  
EWHC 819 (Pat)**

In contentious probate matters there are two long established exceptions to the general rule in CPR 44.3 (2)(a) that costs followed the event. These were stated by Sir Gorell Barns P in *Spiers –v- English* [2007] P 122 and 123, and had survived the introduction of the CPR and were still valid. First, where the testator or persons interested in the residue had been the cause of the litigation the costs should come out of the estate. Second, where the circumstances led reasonably to investigation of the matter, then the costs might be left to be borne by those had incurred them.

When the court takes an issue-based approach and concludes that the case justifies an award of costs on an issue against the overall winner, it is generally convenient to allow for those costs by making an appropriate percentage deduction from the winning party's costs (the percentage set-off approach). This is so, even if the parties' estimates are different as to the percentage spent on the issue as the court should be reluctant to adjust the parties' estimates. Thus, if the overall winner has lost on an issue that accounted for 10% of its overall costs, and the costs of that issue should be paid to the overall loser, then it will normally be appropriate to make a 20% deduction to the overall winner's costs. This was the approach taken by Pumfrey LJ recently in *Monsanto -v- Cargill*. However, the percentage set-off approach becomes problematic where there is a significant disparity in the parties' absolute costs. A striking feature of this case was that RIM's costs were estimated at nearly £6M, whereas Visto's total costs for the whole of the proceedings totalled £1.6M. It would not be fair to assume that the RIM ought to have expended costs at the same level as Visto. Thus, Floyd J awarded RIM 66% of its total assessed costs, to be paid by Visto, and Visto was awarded 51% of its total assessed costs, to be paid by RIM. The judge however did express the clear view that he regarded RIM's costs as disproportionate and directed the costs judge to allow RIM only those costs that were both reasonably and necessarily incurred.

## Other News

### 2008 SCCO Guideline Rates

The early publication of the 2008 guideline rates caught us by surprise and just missed the print run of our winter newsletter. It is important to remember that these are very much guideline rates and are often exceeded on detailed assessment.

Area	Grade A	Grade B	Grade C	Grade D
Band One	£203.00	£180.00	£151.00	£110.00
Band Two	£191.00	£168.00	£139.00	£105.00
Band Three	£174.00	£156.00	£133.00	£99.00
City Of London (EC1, EC2, EC3 , EC4)	£396.00	£285.00	£219.00	£134.00
Central London (W1, WC1, WC2 , SW1)	£304.00	£231.00	£189.00	£121.00
Outer London (All other London postcodes: W, NW, N, E, SE, SW & Bromley, Croydon, Dartford, Gravesend & Uxbridge)	£219.00 to £256	£165.00 to £219	£158.00	£116.00

### Senior Judge to review costs system

It is reported that Master of the Rolls, Sir Anthony Clarke, is to appoint a senior judge to conduct a review of legal costs. It is understood that the review, by no means limited, will include:

- Conditional fee agreements, including the after-the-event insurance market and other types of funding.
- Proportionality - with a view to limiting the amount of costs recovered from a losing party to a sum proportionate to the amount of damages recovered.
- The time spent in the cost assessment process.

## 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.

## Our Service

- We prepare Bills of Costs, Costs Estimates, Statements of Costs, Objections (Points of Dispute), and Replies.
- We advise upon and conduct a whole range of costs related litigation.
- We offer the most current, accurate and practical costs advice.
- We have a reputation for drafting, advocacy and high professional standards.
- We develop specific services tailored to meet our Clients' needs, sometimes in conjunction with other experts and with our Clients' support staff.
- We are accredited legal costs trainers and can provide training and continuing education seminars.
- We can provide a unique one-stop service, taking responsibility for meeting directions, lodging papers and so forth.
- We have rights of audience to conduct costs litigation
- We are qualified to instruct Counsel directly should the need arise.
- Most of our consultants have acted as expert witnesses.

## Where to find us



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### Tubes

Central, Northern, District and circle as well as Docklands Light Railway

### Buses

8,11,15,17,21,23,25,26,43,76,133 and 388

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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