

## **KAIN KNIGHT LEGAL UPDATE**

### **NO. 1 OF 2009**

The Supreme Court Costs Office has kindly provided summaries of decisions brought to the attention of the SCCO.

The summaries are numbered **33 to 52 of 2008 (Section 1)**.

Case summaries for **1 to 32** have previously been circulated.

There then follows summaries of various decisions involving costs issues from September 2008 to date that have been considered by **Kain Knight** as involving costs related issues and worthy of consideration (**Section 2**).

Readers need not be reminded that decisions of lower Courts are included only where an issue is determined that is novel or of particular interest and such cases should be cited with care.

Whilst it is hoped the Judgments are persuasive they are not binding on higher Courts.

**To view summaries 33-52 please refer to our website by clicking on the link below.**

## SECTION 1

### SCCO SUMMARIES 33-52

#### No. 33 of 2008

#### Fulham Leisure Holdings Ltd v Nicholson Graham & Jones [2006] EWHC 2428 (Ch)

5 October 2006

#### Mann J

Expert's fees: this is not a 2008 case but is included in order to highlight the guidance given by the Judge in paragraphs 14 and 15 about the recoverability of expert's fees on detailed assessment:

14. The Defendants instructed an expert ... his reports were served. The Claimant did not prepare or serve any equivalent evidence. At the trial the Defendants decided not to call the expert and I was not invited to read the reports. In the circumstances the claimant maintains that the Defendants should not be allowed any part of the costs of and relating to this expert evidence and indeed says it should have its own costs of dealing with it.
15. I do not accept that the mere fact that the evidence was not deployed is sufficient to justify my disallowing the costs of the experts. This is wrong in principle and likely to lead to witnesses being called merely so as to enable the calling party to be able to recover the costs relating to that witness. It is wrong in principle because the proper question seems to me to be whether the costs were reasonable. That question is not necessarily determined by whether the witness is called. There may be good reasons for having evidence available, and, then, because of the course that the trial takes, deciding for perfectly good reasons not to call that witness. Were it otherwise then there would be a risk of the relevant party calling someone who has become an unnecessary witness merely so as to be able to claim the costs of that witness at the end of the day (or to resist a submission that he/she should not have those costs)."

**No. 34 of 2008**

**Dunn v Mici**

**25 June 2008**

**Master Campbell**

Challenge to validity of CFA for want of compliance with Regulation 4(2)(c) Conditional Fee Agreements Regulations (2000) (Legal Representative required to inform client whether the risk of incurring liability for costs in the proceedings to which the agreement relates is insured under an existing contract of insurance).

CFA signed by Claimant's mother as Claimant's "litigation friend". It was common ground that the mother did not receive any advice under Regulation 4. On assessment, D contended that C's mother was the client and that the CFA was unenforceable for want of Reg. 4 advice. That argument failed. The son was the client, not his mother. He had attained 18 years by the time the action was brought so the expression "litigation friend" in the CFA had no significance under CPR 21 (requirement to appoint a litigation friend on commencement of proceedings if party is under 18). Since the Mother was not "the client" there was no obligation on the legal representative to give her any advice under Regulation 4, nor had she assumed any liability to pay her son's solicitor's costs by reference to Regulation 1(3) CFA Regulations (a person who has instructed a legal representative to provide advocacy or litigation services to which a CFA relates or is liable to pay fees in respect of those services). CFA valid.

**No. 35 of 2008**

**Dix v Frizzell Financial Services [2008] EWHC 90117 (Costs)**

**30 June 2008**

**Deputy Master Williams**

This Judgment addressed two issues on the validity of the claimant's retainer with his solicitors:

(1) Whether it was unlawful at common law to include a term in the Conditional Fee Agreement that the solicitors would indemnify their client against the opponent's charges and disbursements were the case to be lost.

(2) Whether such a retainer was unenforceable by reason of Sections 23 and 26 Financial Services and Markets Act 2000 ("FSMA") as an unauthorised "contract of insurance".

On (1) the offending clause in the CFA said this:

- (e)(i) In all the circumstances, on the information currently available to us, we believe that a contract of insurance is not required.
- (ii) In any event, we will indemnify you against your opponent's charges and disbursements in case you lose. [original emphasis ]

Held – CFA unenforceable (references to paras in Judgment).

- 71. Although this agreement has some features which are in the interests of justice, the nature of this particular indemnity clause being a broad, uncapped, potentially large liability apparently unsupported by a fund or insurance policy, triggered upon the loss of the case whatever the cause, places the solicitor in the position of having too much at stake.
- 72. It would be unrealistic to expect a solicitor to keep a clear eye and unbiased Judgment, and to maintain that proper distance from the client and the litigation which it is his duty to maintain, when the pressure mounts and ethical decisions are needed the consequences of which for the solicitor may be substantial personal liability under this clause.”

As to (2) the Court held that the CFA looked at as a whole had, as its primary objective, the supply of legal services on a CFA basis by a client to a solicitor. Accordingly the contract was not “a contract of insurance” and would not have been rendered unenforceable under Section 26 FSMA had issue (1) been decided in the claimant’s favour. (paragraph 118)

[Note: This is a brief summary; the Judgment needs to be read to do justice to the submissions made and conclusions reached by the Court].

### No. 36 of 2008

### Morris v John Dennis (Barnsley) Ltd (2008) EWHC 90112 (Costs)

17 July 2008

### Master Gordon-Saker

Challenge to Conditional Fee Agreement for want of compliance with Section 58(4) Courts and Legal Services Act (1990).

D alleged that the “prescribed percentage” under S. 58 (4)(b) (viz the success fee claimed at 100%) exceeded the “percentage specified” under sub-section (4)(c) by the Lord Chancellor (100% maximum) on the grounds that the agreement provided for:

***“In addition to our fees and disbursements, if your claim is successful, we will make a charge to you of £150 plus VAT for our administrative work on your case.”***

Accordingly, the success fee was not 100% but 100% plus the administrative fee of £150 plus VAT so the CFA did not comply with Section 58(4) and was unenforceable.

Held – The administrative charge was what it purported to be, an administrative charge for the administrative work done on the case.

It was not an amount of other fees which are increased in specified circumstances but a stand alone fee payable in the event of success, in the same way that basic charges become payable only in the event of success. **CFA enforceable.**

### No. 37 of 2008

#### Sidhu v Sandhu & Anor [2008] EWHC 90108 (Costs)

24 July 2008

#### Master Simons

Conditional Fee Agreement; compliance with Regulation 3(1)(b) Conditional Fee Agreements Regulations (2000) (requirement to specify how much (if any) of the success fee relates to the cost to the legal representative of the postponement of payment of his fees and expenses).

Held – The CFA breached Regulation 3(1)(b) since the client did not know or, at the very least, would have been uncertain as to whether or not in view of contradictory statements made in the CFA he would have to bear any part of the success fee. *Utting v McBain* [2007] EWHC 3293 (QB) ( No 19 of 2007) applied. Further, the breach was material since it had had an adverse affect on the protection afforded to the client and was contrary to the interests of the administration of justice.

### No. 38 of 2008

#### Overton v Horder [2008] EWHC 90109 (Costs)

28 July 2008

#### Master Rogers

Compliance with Regulation 4(2)(e)(ii) Conditional Fee Agreements Regulations (2000) (requirement for the legal representative to give information to the client about financing any or all of the costs and if a contract of insurance is considered appropriate or was recommended, the provision of the solicitors reasons for the recommendation and whether he has an interest in doing so).

C had been referred to her solicitors by Accident Advice Helpline (“AAH”); she entered into a CFA with her solicitors and took out after the event insurance with NIG Skandia. Paragraph 5 of the CFA said this:

*“Our [the solicitors] reasons for this [recommending the NIG policy] are: there are risks in any litigation and for your peace of mind it is important to ensure that your exposure to payment of fees and disbursements is insured. This policy not only indemnifies you against the risk of having to pay your opponent’s fees and disbursements. It also facilitates a funding arrangement with the bank specified in the Schedule under No.7 of the Schedule (“the Bank”) to provide payment of some disbursements for which you are primarily liable as the case proceeds.”*

D contended that the solicitors had failed to reveal to C that membership of AAH’s Panel required panel solicitors to recommend the NIG policy but that this had not been disclosed contrary to Regulation 4(2)(e)(ii). Accordingly the CFA was unenforceable.

Held – There was no evidence that the Solicitors would have lost panel membership if they had failed to recommend the NIG policy nor was it obligatory that they had to do so. No breach of Regulation 4(2)(e)(ii); CFA enforceable.

### No. 39 of 2008

#### Lee v Birmingham City Council [2008] EWCA Civ 891

30 July 2008

#### Thomas, Hughes & Rimer LJJ

Another round in the housing disrepair litigation between Birmingham City Council and its tenants. Where a tenant had served a pre-action protocol complaining about disrepair and the landlord had undertaken repairs within a month, thereby avoiding any need for Court proceedings, the tenant (provided she was correct about liability) was entitled to fast track costs (the track to which the claim would have been allocated under CPR 27.14 had proceedings been issued) of advancing her claim by way of letter under the pre action protocol up to the date that the work was completed.

On the protocol -per Hughes LJ at paragraph 36:

*“... That means that if she wins, she will have fast-track costs of making the claim up to that date. If she fails, she will have nothing. Any costs order, in favour of either side, relating to the period after 26 September [date when work was completed] will remain governed by the allocation to the small claims track. The certain knowledge that that order will stand if she succeeds can inform any efforts to settle. In future cases of a similar kind, the expectation of an order such as this should have a similar effect, and it is to be hoped, without the need for litigation beyond the protocol negotiations.”*

On costs- (proportionality and the success fee) at paragraphs 37 to 38:

- “37. It appears from the claimant's allocation questionnaire that her costs as at 4 June 2007 were put at approximately £7100. Those are base costs, to which no doubt a claim will be made to add whatever success fee has been agreed between solicitor and client. We do not know whether there is some special reason for such a level of costs, but Mr Luba [counsel for the respondent] did not attempt to suggest that they were justified. We say no more than that, unless there is some special factor, costs at that level look prima facie vastly disproportionate, and that if costs ever fall to be assessed they will need to be scrutinised with some little care.
- (38) We are not to be taken to express any view as to whether any particular level of success fee is a recoverable element of the fast-track costs of making the protocol claim. That is a matter for assessment if it is not agreed. It does not follow, as it seems to us on first impression at least, that the same level of success fee appropriate to litigation is necessarily appropriate to the making of the protocol claim. It might be, but that will depend on the realities of the position, and the risk undertaken, as at the time of advancing the claim.”

#### No. 40 of 2008

#### Dadu Ltd v Barrowfen Properties Ltd [2008] EWHC 90110 (Costs)

5 August 2008

#### Master Rogers

Was the paying party entitled on detailed assessment of the receiving party's bill to refer to a document entitled “without prejudice [rough estimate]” provided to the paying party in pre-settlement negotiations? That document had estimated the receiving party's costs at £38,250 to 1 May 2005, whereas the bill for assessment to that date later sought £70,393. The paying party submitted that this called for an explanation under CPR 43 PD 6.5A(1) since the difference between the two figures exceeded 20%, in the absence of which the receiving party should be held to the lower figure.

Having reviewed the authorities, the Court held that as the document had been marked “without prejudice” it should not be referred to during the course of the assessment for any purpose.

#### No. 41 of 2008

#### Woolley v Haden Building Services Ltd (No.2) [2008] EWHC 90111 (Costs)

11 August 2008

#### Master Rogers

This Judgment addressed six preliminary issues which arose on the assessment of the claimant's bill in a substantial asbestosis case funded under a Conditional Fee Agreement.

These included whether the cost of advice given by the claimant's solicitors to their client about funding was recoverable. For its part, the Defendant drew an analogy with advice about legal aid which has never been allowed on assessment between the parties and contended that that practice should be followed in relation to work concerning the claimant's CFA.

The claimant's contention was that since the introduction of CFAs and the implementation of the CPR, matters had moved on and some Costs Judges now allow funding costs, for example in dealing with compliance issues under the CFA Regulations (2000). The Court held that such costs have never been recoverable and nothing had changed as a result of the introduction of the CFA Regulations and CPR. Accordingly all costs relating to advice about funding would be disallowed.

### No. 42 of 2008

### In Re: X and Y (Bundles) [2008] EWHC 205A (Fam)

22 August 2008

### Munby J

This Judgment addresses the continuing failure by the legal professions (Solicitors and Barristers) to comply with their obligations under the *Practice Direction (Family Proceedings; Court Bundles)* [2000] 1 FLR 536 and *Practice Direction: Court Bundles (Universal Practice to be applied in All Courts other than the Family Proceedings Court)* [2006] 2 FLR 199. At paragraph 7 Munby J said this:

*"It is the professional obligation of practitioners making a visit to some unfamiliar Court or tribunal to identify in good time whether there is some particular Guide or Practice Direction or other document regulating practice before that Court or tribunal and, if there is, to familiarise themselves with its requirements and then to carry them into effect."*

Munby J then gave two examples of egregious failures to comply with the relevant Practice Direction in his Court.

At paragraph 18 he continued:

*"In paragraph 12 the Practice Direction warns of sanctions penalising those who fail to comply with this requirement. There is the sanction of costs, either orders for costs against the party in default or orders for costs to be paid by the defaulting solicitors ... In particularly egregious cases, defaulters may find themselves publicly identified in Judgments delivered in open Court."*

[Note: Although this Judgment was given in the Family Division and in the context of breaches of the Practice Direction in Family Proceedings, the guidance in paragraph 7 would appear to be of general application.

The sanctions mentioned in paragraph 18 would, accordingly, appear to be relevant in relation to the oft ignored sections of the Costs Practice Direction, in particular Section 35.2 to rule 47.9 (“points of dispute should be short and to the point”) and Section 40.12 to rule 47.14 (“the papers to be filed in support of the bill and their order”).

**No. 43 of 2008**

**McLoughlin v Irwin Mitchell [2008] EWHC 90113 (Costs)**

**29 August 2008**

**Master Simons**

In proceedings under the Solicitors Act 1974, the Court held that 20 bills rendered to the claimant between 11 November 2004 and 14 September 2006 were interim bills on account of a final bill notwithstanding that the client had paid them without complaint (at least until 10 April 2006). The Defendant’s terms and conditions had stated that a final account would be rendered on completion of the case and none of the bills complied with the provisions of the Solicitors Act sufficient to enable the client to obtain advice as to their assessment. Accordingly, the Defendant would be ordered to deliver a final bill and a cash account.

**No. 44 of 2008**

**Findlay v Cantor Index [2008] EWHC 90116 (Costs)**

**12 September 2008**

**Master Campbell**

In this Judgment the Court refused the paying party’s request for disclosure of the claimant’s Conditional Fee Agreement, risk assessment and, on the grounds that privilege in it had been waived, an opinion of counsel. So far as the risk assessment was concerned, the CFA in question had been signed after 31 October 2005 and the CFA Regulations (2000) did not apply to it. Accordingly there was no obligation on the claimant to disclose the risk assessment under Costs Practice Direction Section 32.5(1)(b) as would have been the case had the CFA been signed before the revocation of the Regulations.

**No. 45 of 2008**

**Cuthbert v Gair [2008] EWHC 90114 (Costs)**

**3 September 2008**

**Master Haworth**

The issue which arose on appeal from a Costs Officer was whether costs claimed for work done by the Defendant's loss adjusters were recoverable as a "disbursement". Prior to instructing solicitors, the Defendant had utilised loss adjusters to deal with the case at an investigative stage during the pre-action protocol period. The receiving party contended that such costs were "of and incidental to" the proceedings and were recoverable under the Court's inherent jurisdiction (see Section 51(1) and (3) Supreme Court Act 1981). The paying party relied on *Agassi v Robinson* [2005] EWCA Civ 1507 (No 7 of 2006) – a person who acts without a solicitor cannot recover as a disbursement the fees and expenses paid to a third party for work of a kind which a solicitor could have done.

Having considered the nature of the work undertaken by the loss adjusters (investigating the circumstances surrounding the accident, obtaining witness statements, etc) the Master concluded that these were all items of work which would normally have been undertaken by solicitors.

The principle in *Agassi* applied and the items were irrecoverable. The Court was not satisfied, either, that further fees claimed for the loss adjusters after the solicitor's appointment, had been incurred on an agency basis, no letters of instruction or terms of engagement having been produced to the Court, only an invoice which had been addressed not to the Defendant's solicitor but to their insurers. It followed that no part of the loss adjuster's fees fell to be paid by the claimant inter partes.

**No. 46 of 2008**

**Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd [2008] EWHC 2280 (TCC)**

**29 September 2008**

**Jackson J**

At the conclusion of high value commercial litigation concerning the construction of the National Stadium at Wembley in which each side had met with success and failure, Jackson J undertook a comprehensive review (paragraphs 43-71) of the authorities which apply in deciding what costs order the Court should make.

The trial had lasted from 10 March until 28 May 2008 and the parties had spent £14 million on costs after 5 June 2006, the Judge having disposed of various preliminary issues on that date.

From his review of the authorities, Jackson J derived eight principles (72):

- (i) the party which ends up receiving payment should generally be characterised as the overall winner of the entire action.
- (ii) as a starting point the general rule is that the successful party is entitled to an order for costs.

- (iii) The Court should ask having regard to all the circumstances of the case, whether any departure is required from that starting point.
- (iv) An issue-based costs order should be made where the circumstances of the case required it but “the judge should hesitate before doing so, because of the practical difficulties which this causes and because of the steer given by rule 44.3(7)”.
- (v) In many cases the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order. [via a proportion based order under CPR 44.3(6)(a)]
- (vi) In considering the circumstances of the case the judge will have regard not only to any part 36 offers but also to each party's approach to negotiations (insofar as admissible) and the general conduct of the litigation.
- (vii) If one party makes a part 36 or an admissible offer that is not quite enough and the other party rejects it without negotiating, then it might be appropriate to penalise the second party in costs. [reflecting *Carver v BAA Plc* [2008] EWCA Civ 412]
- (viii) In assessing a proportionate costs order the judge should consider what costs are referable to each issue and what costs are common to several issues. It will often be reasonable for the overall winner to recover not only the costs specific to the issues which he has won but also the common costs.

Having applied these principles to the litigation, Jackson J ordered the Defendant to pay the claimant 20% of its costs and directed that each party should bear its own costs of a further preliminary issue that had been tried in January 2007.

#### No. 47 of 2008

#### Sibley & Co v Reachbyte & Anor [2008] EWHC 2665 (Ch)

4 November 2008

#### Peter Smith J

This Judgment given in proceedings under the Solicitors Act (1974) is principally concerned with counsels' fees and the consequences arising from the failure (very expensive) of the appellant solicitors to warn their former clients that in view of their unusual nature and amount, it was unlikely that all the fees would be recovered from their opponents (see CPR 48.8(2)(c)).

The sums in issue were substantial, £151,070 reduced to £64,835; and £77,230 reduced to £31,625 for leading and junior counsel respectively. On appeal from the Deputy Master, Peter Smith J upheld the reductions without calling upon the respondent's counsel on the grounds (principally) that:

- (1) The Appellate Court should interfere only exceptionally where the first instance Judge had heard evidence (the position here) (paragraph 34).
- (2) It is wrong to analyse transcripts and nit pick over Judgments below as a vehicle to overturn that Judgment, because that process fails to give true effect to the significant advantage the first instance Judge has in evaluating the witnesses (38).
- (3) The Appellate Court should consider the Judgment as a whole in the light of the material before the Judge and should not be tempted into a detailed analysis of each and every reasonable argument put forward by an appellant at first instance and allegedly not dealt with by the Judge at first instance. (39)

### No. 48 of 2008

#### Bilkus v Stockler Brunton (2008) EWHC 90118 (Costs)

11 November 2008

#### Master Gordon Saker

Detailed assessment of the Defendant Solicitor's bill under the Solicitors Act 1974 against the Claimant (their former client). Was an uplift of £50,000 to reflect "a highly successful result" payable by the Claimant?

Having refused the Defendant's application to amend the bill so that the uplift would cover earlier bills which the Solicitors had rendered (*Polak v Marchioness of Winchester (1956) 1 WLR 818* applied), the Court held that the terms of the Solicitor's retainer did not permit the firm to charge an uplift over and above the agreed hourly rate. Moreover the bill was a final bill and the uplift could not relate to the earlier invoices which had all been interim statute bills. It followed that the claim for uplift would be disallowed.

### No. 49 of 2008

#### Kutsi v North Middlesex University Hospital Trust (2008) EWHC 90119 (Costs)

9 December 2008

#### Master Campbell

Relief from sanctions under CPR 3.9. The claimant did not serve notice of an additional liability (an after-the-event insurance premium for £84,262.50 taken out on 10 August 2007) until 20 June 2008, long after the case had been settled and when negotiations about the costs of the action were at an advanced stage.

Having considered *Supperstone v Hurst* [2008] EWHC 735 (Ch) Floyd J (No.18 of 2008) the Court held that the mitigating factors advanced by the claimant fell short of a "good explanation" and refused to grant relief. It followed that the premium would not be recoverable as a cost of the action.

No. 50 of 2008

Tankard v John Fredricks Plastics Ltd (The Accident Line Protect Cases) (2008) EWCA Civ 1375

11 December 2008

Sir Anthony Clarke MR, Dyson, Jackson LJJ

Was the Conditional Fee Agreement (CFA) in each of three test cases unenforceable for want of compliance with Regulation 4(2)(e)(ii) CFA Regulations 2000 (legal representative required to inform the client whether he had an interest in recommending a contract of insurance, here a policy with Accident Line Protect (ALP))? Each CFA included a declaration that the solicitors had no interest in recommending the ALP policy, although it was a term of their panel membership that all CFA cases had to be insured with ALP (unless for example the client had BTE insurance) and removal from the panel might result from non compliance.

For the three firms of solicitors involved, ALP referrals (including rebates etc) had contributed between 0.15 and 4.57 to their annual turnover.

The Defendants contended that the solicitors had failed to disclose an interest within Regulation 4 and the decisions below had gone both ways. The issue for the Court of Appeal was whether the solicitor had an "interest" within the meaning of Regulation 4(2)(e)(ii).

The Court held that these appeals were far removed from *Garrett v Halton Borough Council* [2006] EWCA Civ 1017 (No.22 of 2006) where cases had been referred by "claims farmers" and the flow of referrals was on a considerable scale. Here the overriding consideration was the quality of the scheme (see paragraph 31); that was why the solicitors had recommended it:

It followed that all three CFAs were valid and enforceable. Had that not been the case, what would the solicitor need to have declared so as to satisfy Regulation 4(1)(a) (informing the client of "matters") and Regulation 4(2)(e)(ii)? Per Clarke MR:-

*"In approaching this issue, we bear in mind that the purpose of the Regulations is consumer protection. This means that in general terms they must be construed in a way which will promote, rather than detract from, such protection. It means in particular that Regulation 4(1)(a) and 4(2)(e)(ii) must be construed in a way which will ensure that the solicitor discloses to the client the true nature of his interest in recommending the insurance so that the client can make the necessary informed decision. This entails explaining to the client the nature of the benefits to the solicitor in remaining on the ALP panel with sufficient clarity for the client to understand what they are and to be able to assess their significance [paragraph 41]*

...

*In our view, the Regulations require clear disclosure of the interest. Anything less would mean that they fail in their objective of providing consumer protection ... [45]"*

*Note: Regulation 4 applied to the three CFAs because all had been entered into prior to the repeal of the CFA Regulations 2000 with effect from 1 November 2005.*

### No. 51 of 2008

#### J Murphy & Sons Ltd v Johnston Precast Ltd [2008] EWHC 3104 (TCC)

16 December 2008

#### Coulson J

Interest on costs [numbers in brackets refer to paragraph numbers in the Judgment].

At the conclusion of high value building litigation, the Judge ordered the claimant to pay the Defendant's costs of the action on the standard basis. C sought interest on those costs at an enhanced rate. Coulson J noted that power exists under CPR 44.3(6)(g) to award interest on costs "from or until a certain date, including a date before Judgment" and that the rule had been considered in *Bim Kemi AB v Blackburn Chemicals Ltd* [2003] EWCA Civ 889 and *Nova Productions Ltd v Mazooma Gains Ltd* [2006] EWHC 189 (Ch) (Kitchin J) [32]. Here the claimant had achieved a resounding victory and interest on costs would be payable from the date of commencement of the action until the date of Judgment [34]. An award of base rate plus 1% represented a properly compensatory rate of interest [36]. The rate would not be enhanced in recognition of the fact that the Defendant had made two separate offers which the claimant would have been well advised to accept. The express power to award such interest in relation to the claimant's costs under CPR 36.14(3)(c) is not available under the CPR in respect of the costs of a Defendant where the claimant has failed to beat the offer made [39].

### No. 52 of 2008

#### Clarke v Waters [2008] EWCA Civ 1459

19 December 2008

#### Arden, Thomas and Moore-Bick LJJ

This appeal by the Defendant addressed the appropriate success fee to allow where liability had been admitted before (rather than after) the claimant had entered into a Conditional Fee Agreement (CFA) with her solicitors.

Against a claim for 98%, the District Judge had allowed 70% and the Circuit Judge 50%. Whilst in the Courts below it had been recognised that the risk of failure was minimal, the real difficulty in assessing the success fee lay in the risk of the solicitors failing to recover part of their fees in the event that a subsequent Part 36 offer was not beaten. In the view of the Court of Appeal, a reasonable assessment in overall terms was 17%; using the "ready reckoner" that gave a success fee of 20% so the appeal succeeded. The Court also

expressed the view that consideration should be given about whether a new regime for CFAs could be devised for cases where liability is admitted.

## SECTION 2

### 1. **DAVID PEAKMAN v LINBROOKE SERVICES LTD (2008)**

[2008] EWCA Civ 1239

CA (Civ Div) ([Mummery LJ](#), [Smith LJ](#), [Goldring LJ](#)) 13/11/2008

**The allocation of a case to the multi-track rather than to the small claims track because of the existence of a substantial counterclaim that should never have been brought was a relevant factor that the judge should have taken into account when exercising his discretion on costs.**

The appellant (P) appealed against a decision to make no order for costs. P was a self-employed cable jointer. The respondent (L) retained P to carry out work for it. L was doing the work for another company (T). P's claim against L was for work done, the costs of diesel fuel, damages for summarily terminating his contract without reasonable notice and for the cost of replacing tools that had gone missing. His total claim was for £2,232.40. L contested all the claims. It claimed that the work done by P was of poor quality and that he had repudiated his contract, alternatively it was terminable at will. L counterclaimed for the costs of remedial work required to rectify P's defective work in the sum of £3,019.44. L also counterclaimed for loss of profits because it had allegedly lost contracts with T as a result of P's work, the loss on a single contract being said to be over £30,000. P succeeded in his claim for work done, for the reimbursement of his fuel costs and in respect of his tools, subject to a reduction of 25 per cent. The judge awarded P £1,145. L recovered 50 per cent of its claim for defective work in the sum of £1,410 and interest. The Judgments were to be satisfied by the payment of 265 plus interest by P to L. The judge made no order as to costs.

P submitted that the counterclaim in respect of lost profit on contracts with T was hopeless from the beginning and should never have been advanced, the existence of the T counterclaim meant that the case was allocated to the multi-track rather than the small claims track and that should have been reflected in the judge's costs decision.

HELD: (1) The judge was right to find, as far as the claim and basic counterclaim were concerned, that there was no winner for the purposes of the [CPR r.44.3\(2\)\(a\)](#). P succeeded in respect of part of his claim. His claim that any defective work was not his fault failed, as did a claim for loss of future work. L succeeded in its claim regarding defective workmanship, although not to the full extent of its claim. P had to pay an insignificant sum to L. (2) The T counterclaim was hopeless as was clear both from the trial documents and what the judge said about it in his Judgment. It was clear that there was never any evidential basis for the T counterclaim. That was so when the case was assigned to the multi-track. The further information ultimately provided

underlined that. Yet even on the first day of the trial L sought to keep the issue in play.

The T counterclaim should never have been brought. It should in any event have been abandoned long before trial. (3) By the [CPR r.44.3 \(4\) \(a\)](#) the Court was obliged to have regard to all the circumstances including the conduct of the parties. It was inconceivable that, absent the T counterclaim, the case would have been in the multi-track. It would have amounted to a straightforward case involving at most a little over £3,000 in which P might have represented himself. The normal track for such a claim would have been the small claims track. The complexity of the case would not have dictated the multi-track.

Therefore L's conduct had resulted in P incurring substantially more costs than would otherwise have been the case and the judge was plainly wrong in not taking that into account as a relevant factor in exercising his discretion as to costs. His order would be set aside.

The right order was for L to pay 50 per cent of P's costs from the date of allocation to the multi-track. Appeal allowed.

2.

**R (on the application of BALCHIN) v SOUTH WESTERN MAGISTRATES' COURT (2008)**

DC ([Latham LJ](#), [Davis J](#)) 27/11/2008

**A costs assessor and a magistrates' clerk had misdirected themselves by applying the test of subjectivity and the test of necessity when disallowing certain legal fees in the making of a costs assessment.**

The claimant (B) applied for judicial review of a decision of the Defendant magistrates' Court to uphold a costs assessment made in respect of proceedings brought against B by a local authority. A summons issued against B alleging obstruction under the Highways Act 1980 had been dismissed, and a costs order was made in his favour. B's solicitors lodged a bill of costs. A costs assessor considered the reasonableness of the work done, and in a decision letter, having stated that the test was a subjective one, found that it had not been necessary or reasonable for counsel to have been instructed in the matter. Counsel's costs, as well as solicitors' fees incurred in respect of instruction to counsel were accordingly disallowed.

That decision was challenged, but it was upheld by the magistrates' clerk.

HELD: The decision could not stand because the assessor and the clerk misdirected themselves in applying the test of subjectivity and the test of necessity, neither of which were permissible under the relevant legislation and regulations, namely the [Prosecution of Offences Act 1985](#) and the [Costs in Criminal Cases \(General\) Regulations 1986](#). The decision was quashed and the matter was remitted for fresh consideration. Application granted.

3. **(1) BRAY WALKER SOLICITORS (A Firm) (2) BEVANS BRAY WALKERS LTD (T/A BEVANS) v CARLO MOISE SILVERA (2008)**

[2008] EWHC 3147 (QB)

QBD ([Blake J](#)) 18/12/2008

**Solicitors were entitled to payment of their fees under various conditional fee agreements in circumstances where there was no evidence before the Court of a breach of contract or of a breach of the Conditional Fee Agreements Regulations 2000 which would disentitle them to their fees.**

The claimant solicitors (B) sought payment of their basic costs incurred when they acted as solicitors for the Defendant (S). S had brought proceedings for negligence and breach of contract against his former legal advisors.

B acted for S in those proceedings over a period of 4 years pursuant to a number of conditional fee agreements.

The CFAs remained unpaid and B issued proceedings for payment. S disputed liability on the basis of breaches of the regulations governing the CFAs and by B of the terms of the retainer and CFA under which they were retained.

The parties disputed the terms of the CFAs. S submitted that B had breached the [Conditional Fee Agreements Regulations 2000](#) as they had failed to explain to S properly the effect of the CFA and how it could be brought to an end and S further claimed that B had failed to explore insurance cover.

HELD: There was no evidence before the Court of breach of contract disentitling B to their fees. Fees could not be recovered under a CFA unless there had been substantial compliance with the duties set out in the Regulations. On the evidence there had been no breach of the Regulations.

There was no reason to believe that the costs of the litigation could be met under an existing contract of insurance. If the client or the context suggested that the litigation costs might be covered by a pre-existing policy of insurance then there was a clear duty to investigate the matter with appropriate scrutiny. It did not require detailed inquiry into something that there was good reason to believe not to exist. B had not been in breach by not looking into the question of insurance as there was no basis for any belief that an existing contract of insurance might have covered the risk.

B had satisfied the Court on the evidence that they had made out their claim for the recovery of their basic fees due under the contract set out in the CFAs. S had failed to satisfy the Court that the contract was unenforceable by reason of non-compliance with the regulations or any other pleaded reason. Judgment for claimants.

4. **LORD CHANCELLOR v JOHN CHARLES REES & ORS (2008)**

[2008] EWHC 3168 (QB)

QBD ([Sir Charles Gray](#)) 19/12/2008

**Where assessing the amount of basic fees payable to counsel for their work on complex and lengthy criminal proceedings for serious fraud, publicly funded under the Criminal Defence Service (Funding) Order 2001, and determining what amounted to reasonable remuneration for work done, a costs judge had erred in rejecting the fees of prosecuting counsel as a relevant comparator and in considering that additional remuneration could be recovered for other professional work lost as a result of counsels' lengthy involvement in the instant case.**

The appellant Lord Chancellor appealed against the decision of a costs judge to increase by significant amounts the basic fees allowed to the respondent counsel (R). R had acted for Defendants in complex and lengthy criminal proceedings for serious fraud.

As they had been instructed under public funding pursuant to the [Criminal Defence Service \(Funding\) Order 2001](#), the basic fees payable to them were subject to an ex post facto assessment that was, they were to be assessed retrospectively.

The determining officer who subsequently carried out that assessment held that the basic fees claimed by R were wholly unsupported and should be reduced. In arriving at his conclusion, the determining officer took account of the fees paid to the prosecuting counsel and the rates that would have been payable to R if the case had been accepted under the very high cost cases scheme. He did not consider the graduated fee scheme as being a comparator. On appeal, the costs judge increased the basic fees payable to R by significant amounts. He held that the Clerk of the Parliaments Reference Regarding Criminal Legal Aid Taxation (2000) 1 Costs LR 7, which was a report that reviewed the fees allowed to barristers for conducting appeals to the House of Lords, did not lay down any general principles, and that the very high cost cases scheme, graduated fee scheme and the prosecution counsel fees were not relevant comparators for determining R's fees. He also held that, where appropriate, a determining officer could take into account the issue of "lost work" and the recovery of additional remuneration for other professional work lost as a result of R's lengthy involvement in the instant case.

The Lord Chancellor submitted that, pursuant to the House of Lords report, the costs judge had erred in failing to consider as comparators the very high cost cases scheme, graduated fee scheme and prosecution fees, and that no allowance could be made for lost work.

R submitted that, in determining the reasonable amount to be paid to counsel by way of basic fees in ex post facto cases, the use of any comparators was illegitimate and impermissible.

HELD: (1) Pursuant to [sch.1 para.1\(2\)](#) and [sch.1 para.15\(1\)](#) of the 2001 order, the appropriate officer, in determining costs, was required, having taken into account all the relevant circumstances of the case, including the nature, importance, complexity or difficulty of the work and the time involved, to allow a reasonable amount in respect of all work actually and reasonably done. Further guidance as to the factors relevant in determining the reasonable amount were to be found in the Taxing Officer's Notes for Guidance 2002.

In accordance with the House of Lords report, which was not intended to be confined to appeals in criminal cases to the House of Lords, it was in principle legitimate to have regard to comparators as a means of cross-checking what amounts should be payable to counsel by way of ex post facto fees in other criminal cases. (2) The House of Lords report specifically stated that in appeal cases the fees paid to the prosecution ought to provide guidance as to the proper fee for defence counsel. In many cases it would be legitimate for the determining officer to take such fees into account, [Lord Chancellor v Wright \(1993\) 1 WLR 1561 QBD](#) applied. Although there were obvious differences between the role of a prosecutor and a defender, such factors did not amount to a good reason for rejecting the use of prosecuting counsels' fees as a comparator. (3) A comparison with fees payable in cases within the very high costs cases scheme might, however, be inappropriate by reason of the particular circumstances of the ex post facto scheme under consideration. That particular scheme remained separate and distinct from the category of cases where costs were assessed on an ex post facto basis. Likewise, sufficient care should be taken when using the graduated fees scheme as a comparator, due to the difference in cases under the fees scheme and ex post facto.

It was not legitimate to use privately funded cases as comparators in the assessment of publicly funded work.

Privately funded work was market-driven and was the subject of negotiation, whereas publicly funded work was closely regulated. (4) In respect of the issue of lost work, although R's commitment of time in the instant proceedings was very significant, it was clear from the wording of Sch.1 para.1 that the costs to be determined were the costs of "work done" under the relevant representation order, so that the amount allowed related only to work "actually and reasonably" done in that case, [Loveday v Renton \(No2\) \(1992\) 3 All ER 184 QBD](#) applied. In any event, the calculation of the value of lost time would be a formidably difficult task and represent a significant additional burden for determining officers. (5) The costs judge had, accordingly, fallen into error in the way he had dealt with R's costs and the assessments were remitted to a costs judge for determination of the appropriate fees payable in each case. Appeal allowed.

5. **C (A PATIENT ACTING BY HER LITIGATION FRIEND JOCELYN FOX) v W (2008)**

[2008] EWCA Civ 1459

CA (Civ Div) ([Arden LJ](#), [Thomas LJ](#), [Moore-Bick LJ](#), [Master Hurst](#)) 19/12/2008

**Where liability had been admitted in an action for personal injuries a judge had erred in allowing a success fee under a conditional fee agreement of 50 per cent, the appropriate success fee in the circumstances was 20 per cent.**

The appellant (W) appealed against a success fee under a conditional fee agreement allowed by a judge in costs proceedings following an action for personal injury between W and the respondent (C). W admitted liability for injuries to C. C instructed solicitors and entered into a CFA. That agreement provided for a success fee of 98 per cent of which 15 per cent represented the cost of funding.

The CFA was modelled on the Law Society's standard form of agreement which contained a clause that provided that in the event C was advised to reject an offer of settlement, and damages were awarded that were less than or equal to the offer C would not have to pay any of the solicitors' basic costs or percentage increase for the work done after notice of the offer was received.

W raised the issue of contributory negligence, which was subsequently not relied on. The claim was subsequently settled. When assessing costs the district judge allowed a success fee of 70 per cent.

On appeal the success fee was reduced to 50 per cent. W contended that the success fee was too high given that liability had already been admitted at the time the CFA was entered into and, in those circumstances, there was no significant risk that C would fail to recover substantial damages in respect of her injuries even if she was found partly to blame.

On behalf of W it was submitted that it was wrong to calculate the success fee in the way that would have been appropriate if liability had been in doubt.

HELD: It was accepted by the parties that a success fee had to reflect a reasonable and rational assessment of the risks facing the solicitors at the time when the agreement was entered into. In the absence of any evidence that the accident had been caused by anything other than the negligence on the part of W, and in light of the fact liability had been admitted, it was difficult to see how C would have failed to recover substantial damages given the serious nature of her injuries. It followed that the chance of success was very high.

The real difficulty was the assessment of the risk that the solicitors might lose the right

to recover part of their fees as a result of C's failure to beat a [CPR Pt 36](#) offer which she rejected on the advice of the solicitors. The chance that the solicitors would advise C to reject an offer which she subsequently failed to beat at trial was difficult to assess but it was unlikely that highly experienced solicitors practising in that field would differ widely in their assessment.

A costs judge could not refuse to award a success fee simply on the grounds that the difficulty of assessing the risks made it unreasonable to enter into a CFA at all.

There was nothing unreasonable in entering into a simple CFA at a time when liability had been admitted, provided that the parties made a proper assessment of the inevitably much reduced risk of failure. In the circumstances the success fee allowed by the judge was too high and a success fee of 20 per cent was appropriate.

Appeal allowed

**6. BIRMINGHAM CITY COUNCIL v ROSE FORDE (2009)**

[2009] EWHC 12 (QB)

**QBD (Birmingham) ([Christopher Clarke J](#)) 13/1/2009**

**A retrospective success fee in a retrospective conditional fee agreement was not contrary to public policy.**

The appellant local authority appealed against a decision on preliminary issues about costs in litigation with the respondent (F), who was one of its tenants. F had signed a conditional fee agreement (CFA) agreement with her solicitors in relation to proceedings against the local authority for failure to repair her property. Shortly before the proceedings were settled the local authority had challenged the validity of similar CFA's and her solicitors wrote to her asking her to sign a second CFA.

The letter explained that the legal costs up to that date would be dealt with under the second CFA unless the Court ruled it invalid, in which case they would revert to the first CFA, and that the second CFA contained a success fee, whereas the first did not. The consideration expressed in and for the second CFA was that the solicitors would continue to act for F. In costs proceedings the master decided that the letter formed part of the second CFA, that the solicitors' agreement to act was adequate consideration, that the presumption of undue influence did not arise, that a retrospective success fee was not permissible but that that did not invalidate the second CFA and that accordingly it was enforceable.

The local authority submitted that (1) the letter did not form part of the retainer agreement; (2) there was no consideration for the second CFA because the solicitors were already bound to continue acting for F under the first CFA, which was never terminated in accordance with its terms; (3) the second CFA had to be presumed to have been procured by undue influence and it was manifestly to F's disadvantage because of the success fee and because it imposed a retrospective liability whereas,

if the first CFA was invalid, she was not liable for the solicitors' fees under it; (4) a retrospective success fee was abhorrent and a retrospective CFA, with or without a success fee, was unenforceable, particularly when the CFA was made after the [Conditional Fee Agreements \(Revocation\) Regulations 2005](#) but related to a period before those Regulations came into force when the solicitor would have had to comply with the notice requirements in the [Conditional Fee Agreements Regulations 2000 reg.4](#).

HELD: (1) The letter had been part of the retainer. Not only did it invite acceptance of the second CFA, it also contained two provisions that the parties must have intended to be part of their agreement. As the second CFA had been entered into under the regime applicable after the 2005 Regulations it had not been necessary for F to sign the letter for it to have contractual effect, nor did a CFA have to be contained in one document, [Jones v Wrexham BC \(2007\) EWCA Civ 1356, \(2008\) 1 WLR 1590](#) applied. (2) The consideration consisted of continuing to act, in circumstances where, if the local authority had been right in its challenge to the validity of the first CFA, the solicitors had no obligation to continue acting, and the right not to do so, [Williams v Roffey Bros & Nicholls \(Contractors\) Ltd \(1991\) 1 QB 1 CA \(Civ Div\)](#) and [Arrale v Costain Civil Engineer \(1976\) 1 Lloyd's Rep 98 CA \(Civ Div\)](#) considered. The provision of an enforceable obligation to provide services in place of one which the local authority asserted to be unenforceable was consideration for a fresh promise to pay.

Further, the second CFA provided a benefit to F that the first had not because it extended the scope of work covered by the retainer. (3) F's willingness to sign the second CFA was readily accounted for by the ordinary motives of ordinary people, namely her wish for the solicitors to continue acting for her and for them to be paid for their work, and no presumption of undue influence arose [Royal Bank of Scotland Plc v Etridge \(No2\) \(2001\) UKHL 44, \(2002\) 2 AC 773](#) applied. Although the success fee was an additional liability it was subject to assessment as to reasonableness by the costs judge, and if and to the extent that F was liable to pay it, it would be recoverable from the local authority, whose ability to pay was not in doubt. So the disadvantage was more apparent than real. (4) There was no prohibition on CFA's being retrospective and no reason per se why a retrospective success fee was contrary to public policy, [Adam Musa King v Telegraph Group Ltd Unreported](#) disapproved.

The Court had the ability to disallow or reduce retrospective fees that were unreasonable. If that were wrong, there was no reason why the Court could not delete the success fee leaving the obligation to pay unaffected.

There was nothing in the statutory provisions requiring a retrospective CFA to comply with the notice requirements in reg.4 of the 2000 Regulations and no reason to conclude that the second CFA was invalid because the retrospection extended back to before the 2005 Regulations had been introduced. Appeal dismissed

**7. LINDSEY FINDLEY (BY HIS SISTER & LITIGATION FRIEND, JOY FINDLEY CLARKE) AND BARRINGTON JONES (1) MIB (2)**

[2009] EWHC 9030 (COSTS)

### **SCCO (SENIOR COSTS JUDGE MASTER PETER HURST) 13.01.09**

The Senior Costs Judge found various CFA's entered into were unenforceable by reason of the Claimant's Solicitor failing to provide any adequate oral explanation of the matters as required by Regulation 4 of the CFA Regulations 2000; the Senior Costs Judge found that the Claimant's Solicitor did have a disclosable interest in the TAG policy rendering the CFA unenforceable. The Senior Costs Judge also gave a ruling on the issue of increased hourly rates; the Claimant's entitlement to recover the full amount of the disbursements deemed reasonable and proportionate and any failure to explain to the Client any potential liability for his own and/or adverse costs in excessive of the limits of the legal expenses insurance policy did not have any materially adverse effect on the protection afforded to the Claimant, or on the administration of justice.

On 22 April 2001 the Claimant, an unemployed drug addict of no fixed abode, who had previously served a prison sentence for robbery, was the front seat passenger in a car which collided with a stationary van. The Claimant sustained severe head injuries in the collision. The driver of the vehicle, the First Defendant, was uninsured and accordingly the MIB became involved in the claim.

The claim was ultimately settled by consent for the sum of £1 million on 25 June 2007. The Defendants were ordered to pay the Claimant's reasonable costs, to be assessed if not agreed.

The litigation was funded under the Accident Group (TAG) Scheme. The Claimant entered into a CFA with his Solicitors on 20 July 2001; thereafter following the Judgment in *English v Clipson* the Claimant signed a second CFA.

The Claimant's Solicitor first met the Claimant and his Sister, who later became the Litigation Friend, on 28 January 2003, all previous contact had been by telephone and letter. Thereafter, a conference was arranged with Counsel, Counsel advised that the Claimant needed to have a Litigation Friend. Shortly thereafter, the Claimant's General Practitioner certified that he was incapable of managing his own affairs because of a permanent mental disability and his Sister was subsequently appointed the Claimant's Litigation Friend.

It was this sequence of events that led the Second Defendant to raise a number of issues as to the validity of the two CFA's, the capacity of the Claimant and sundry subsidiary issues.

The issues before the Senior Costs Judge fell into five main headings, namely:

- (i) The Conditional Fee Agreement dated 20 July 2001;
- (ii) Capacity;
- (iii) Letter of 4 May 2006;
- (iv) The second CFA;
- (v) The Indemnity Principle and the legal expenses insurance (LEI) policy.

The Defendant submitted that the CFA dated 20 July 2001 was unenforceable because of material breaches of the Regulations of the CFA Regulations 2000 in that the Solicitor failed to provide the Claimant any adequate or an explanation of the matters required and failed to consider other methods of financing the matter or considering any particular insurance product as being appropriate because the Solicitor wrongly considered himself unable to do so and had concluded that the Claimant was “contractually bound” to effect an insurance policy with TAG. Further, the Defendant enquired as to whether the Claimant’s Solicitor had any disclosable interest in the TAG policy thus rendering the CFA unenforceable.

In respect of capacity, the Defendant enquired as to whether the CFA with the Claimant came to an end as a result of a lack of capacity on the part of the Claimant and if so, was there any alternative basis on which the Claimant or his Litigation Friend could seek to recover costs claimed in the Bill after the date on which the CFA came to an end? Further, the Defendant contend that in any event, if the original CFA was terminated at any stage prior to the case being “one” the Claimant was not liable for any costs under the CFA and accordingly the Claimant was unable to recover any such costs inter-partes.

The Defendant requested the Senior Costs Judge to consider the status and effect of a letter dated 4 May 2006 enquiring whether the same amounted to a reasonable variation of the Retainer (if any) between the Claimant and his Solicitor to allow the Solicitor to vary the hourly rates unilaterally and without apparent limit in circumstances where the original CFA provided for any increase to be by no more than the increase in the Retail Price Index.

The Defendant challenged the validity of the second CFA entered into in autumn 2002. Finally, the Defendant enquired whether the Claimant’s liability for own disbursements was limited by reference to the extent of his legal expenses insurance cover and his potential liability for adverse costs?

Further, did the failure to explain to the Client any potential liability for own and/or adverse costs in excess of the limits of the legal expenses insurance policy amount to a “further” breach of Regulations such as to render the CFA unenforceable?

Detailed consideration was given to the issues by the Senior Costs Judge and the thirty six page Judgment is available on **Bailii**.

In his conclusion the Senior Costs Judge found that the possibility of the Claimant losing this action was never anything other than remote. The high point of the risk was after an offer of £850,000.00. Experienced Leading Counsel had been instructed and a good settlement was achieved for the Claimant. Although there was a theoretical possibility that the Claimant might be left with a personal liability for his own disbursements and/or adverse costs, the Senior Costs Judge did not regard the failure by the Solicitors to go into that level of detail as a breach of the Regulations.

In any event, the Senior Costs Judge was not persuaded that the breach had any materially adverse affect even on the protection afforded to the Client or on the administration of justice, nor did the Senior Costs Judge view that the Claimant’s liability for disbursements was in some way capped because the Solicitor did not spell

out to him the theoretical possibility that he might have an open ended liability.

On considering the **CFA** dated 20 July 2001 the Senior Costs Judge found that the Agreement was unenforceable as the Solicitor failed to provide any adequate oral explanation as to the matters required by Regulation 4; further, the CFA was unenforceable by reason of the fact that the Claimant's Solicitor failed to provide the Claimant with the information required with regard to other methods of financing the costs and further, the Senior Costs Judge found that the Solicitor did have a disclosable interest in the TAG policy and the failure to disclose that interest resulted in the CFA being unenforceable.

Dealing with the issue of **capacity** the Senior Costs Judge found that the CFA had come to an end as a result of the Claimant's lack of capacity on 4 February 2004 but that the Litigation Friend by her conduct instructed the Claimant's Solicitors on the same terms as the second CFA and that the oral and written explanation given to the Claimant on 28 January 2003 was also given to and understood by the Litigation Friend. The question of whether the Retainer between the Litigation Friend and the Solicitors was one which complied with Section 58 of the Court and Legal Services Act 1990 depended on the outcome of issues arising from the second CFA (refer to issues 10 and 11 below). Subject to the second CFA proving to be enforceable, the Senior Costs Judge found that the Claimant had a liability to his Solicitor for the period up to 4 February 2004 for reasonable costs pursuant to Section 1(3) of the Law Reform (Frustrated Contracts) Act 1943.

Having considered the issue of the **Letter of 4 May 2006** the Senior Costs Judge held that the same could only be relied on to increase the hourly rates recoverable by reference to the Retail Price Index from 4 May 2006 but that the letter did not amount to any wider variation of the terms of the Retainer set out in Conditional Fee Agreement 2.

On consideration of **the second CFA** the Senior Costs Judge was satisfied that the Claimant did enter into a second CFA in the Autumn of 2002; however, the same did not comply with the Regulations in that no adequate explanation was given to the Claimant in respect of the TAG ATE insurance, or the Solicitor's interest in recommending it.

The Senior Costs Judge ruled, however, that those breaches did not have a materially adverse effect on the protection afforded to the Client or on the administration of justice. The Litigation Friend had instructed the Solicitors on the same terms as those in the second CFA. There was a breach of the Regulations in that the second CFA was not signed by the Litigation Friend. For the reasons given that breach had not had a materially adverse effect on the protection afforded to the Client, or on the administration of justice. The Senior Costs Judge was satisfied that the first CFA was not terminated when the second CFA was entered into, the Claimant accepting that if the second CFA was effective the first CFA was unenforceable with no costs to be paid under the first CFA.

Consideration was given to **the Indemnity Principle and the LEI policy**; the Senior Costs Judge finding that Claimant's liability for his own disbursements was not limited by reference to the extent of his legal expenses insurance, the Claimant being able to recover the full amount of the disbursements deemed reasonable and proportionate

and the Senior Costs Judge held that if the Solicitor's failure to explain to the Client any potential liability for his own and/or adverse costs in excess of the limits of the legal expenses insurance policy amounts to a breach of Regulation 2(1)(b) and/or Regulation 4(2)(a) (which the Senior Costs Judge did not find), that breach does not have any material adverse effect on the protection afforded to the Claimant, or on the administration of justice.

**8. DONALD BURGESS AND J BREHENY CONTRACTS LTD**

[2009] EWHC 90131 (COSTS)

**SCCO (MASTER HAYWORTH)**

**The Claimant was entitled to take out after-the-event insurance and the premium of £2,600.00 plus IPT whilst at "first blush" appeared disproportionate was recoverable.**

Following a dispute between the parties the majority of the Claimant's costs were agreed by the Defendant, the only outstanding items being:

- i. An after-the-event insurance premium claimed in the sum of £2,730.00;
- ii. The costs of preparing the Bill of Costs which is claimed in the sum of £104.90; and
- iii. The success fee applicable to the costs of preparing the Bill claimed in the sum of £65.56.

The matter was described as an unusual personal injury case not falling into any of the standard categories of claim. The claim arose from an allegation that sand and ballast blown into the Claimant's house and garden during construction work undertaken by the Defendant had caused the Claimant to suffer breathing problems owing to dust inhalation. The matter was compromised in the sum of £1,500.00 damages with costs to be assessed if not agreed. The Claimant took out after the event insurance with UIA on 13 July 2007.

The policy had a two-stage premium. The base premium was £2,600.00 plus IPT of £130.00. An additional sum would have been payable on allocation but this stage was not reached.

A Statement was provided by a Partner in the Claimant's firm of Solicitors dealing with the assessment of insurance premiums.

The Court was provided with a success fee assessment together with details of enquiries made into alternative funding available.

The Defendant's evidence consisted of a Witness Statement from Matthew David Hoe, employed as a Legal Assistant with the Defendant's Solicitors supporting the second limb of the Defendant's argument, namely that if the Court found that the premium was recoverable, a reduced amount should be allowed; Mr Hoe referred to

his experience in dealing with personal injury claims and his own investigations as to possible availability of ATE insurance in respect of matters where liability had been admitted and the dispute related solely to quantum.

Mr Hoe submitted that he had been unable to identify ATE policies tailored to cases in which liability had been admitted already and suggested, therefore, the lack of availability implies lack of demand. If, which was not accepted by the Defendant, the Claimant was entitled to recover an insurance premium, Mr Hoe suggested an allowance of “£650.00 plus IPT would be the maximum reasonable amount to allow”.

The Costs Judge was required to consider:

- i. Whether it was reasonable to take out ATE insurance;
- ii. If reasonable, could the level of premium be sustained;
- iii. That it had been unreasonable to prepared a Bill of Costs for assessment where there was only one item in dispute, namely the ATE premium; should an allowance be made for the preparation of the Bill of Costs, the success fee for drawing the Bill should be limited to 20%.

In his Judgment the Costs Judge found that it was reasonable for the Claimant to take out after-the-event insurance, the Costs Judge having to have regard to Section 11.7 CPD which required the Costs Judge to have:

*“Regard to the facts and circumstances as they reasonably appeared to the Solicitor when the insurance was entered into”.*

The Costs Judge was unable to look at the inception of the ATE policy with the benefit of hindsight.

At the time the ATE policy was taken out the Defendant Insurer had admitted primary liability although causation was in issue. The Claimant had already entered into a Conditional Fee Agreement and in the Judgment of the Costs Judge at the time the policy was entered into there were a number of risks against which it was proper to ensure.

The Costs Judge admitted that “at first blush a premium of £2,600.00 plus IPT when set against damages of £1,500.00 appears disproportionate. The premium alone is almost twice the damages recovered and appears to fly in the face of Rule 44.4(2) and the test that I am required to apply following the Judgment of Woolf MR in the case of *Lowndes*”.

The Costs Judge referred to the evidence produced by the Partner in the Claimant’s Solicitors who set out in clear terms his reasons for recommending the UIA Scheme in the context of this type of litigation.

The evidence was accepted by the Costs Judge who stated: *“Conversely, the evidence of Mr Hoe for the Defendant failed to produce any evidence of the level of premiums in disease cases. Furthermore, his Witness Statement failed to*

*demonstrate that any reduction in premium resulting from an unqualified admission of liability is anymore than slight. Whilst the premium claimed is high in my view, I have concluded in the words of Brook LJ at paragraph 117 of the **Rogers** case that I do not have the expertise to Judge the reasonableness of a premium except in very broad brush terms. I bear in mind his comments that the very viability of the ATE market will be imperilled if I were to regard myself (without the assistance of Expert evidence) as better qualified than the Underwriter to rate the financial risk the Insurer faces”.*

The premium was allowed in full.

With regard to the Bill of Costs, the Costs Judge held that there was no need for the Claimant to prepare a Bill of Costs dealing with just one item finding that the preparation of the Bill and the consequent success fee element were disproportionate to the only issue at stake.

**9. JEFFREY WAKEFIELD (T/A WILLS PROBATE AND TRUSTS OF WEYBRIDGE) v (1) IAN ROGER FORD (2) CAPORN CABELL (A Firm) (2009)**

[2009] EWHC 122 (QB)

QBD ([Eady J](#)) 29/1/2009

**Where an offer to settle defamation proceedings had been made several months earlier and had expressly provided for costs "to date", it was clear that the offer was not to continue indefinitely into the future and that it had expired, and therefore it could not subsequently be accepted.**

The applicant (W) applied for an order that he should be permitted to accept an alleged outstanding offer to settle defamation proceedings that had been made by the respondent solicitors (F) several months earlier. W wrote and advised on the preparation of wills. He had prepared a deed of variation for a client, and asserted that it had been specifically drafted by counsel with the client in mind. However, the deed had referred to issues that were not relevant and contained paragraphs that were inconsistent with each other.

It was alleged that W had plagiarised or copied a precedent of a deed relating to a different person entirely, and that he had merely copied the documents more or less word for word without applying his mind to the appropriateness of the drafting to the case in hand. It followed that F informed a third party firm of solicitors that they were acting on a claim arising out of W's admitted negligence in the preparation of the deed in question.

W brought libel proceedings against F on the grounds that the words in question bore the meaning that he had been negligent in another case and that the negligence had been admitted by him.

The Court held that the occasion of publication was protected by qualified privilege, and that the real sting of the claim was in the allegation of negligence, rather than the issue concerning admission.

F also claimed a plea of justification that W had indeed been negligent in certain respects and that an admission had previously been made on his behalf. W alleged

that F's comment had therefore been made maliciously and continued to press ahead with his claim, despite numerous attempts by F to persuade otherwise, on the basis that it would prove impossible to establish malice against them. W therefore rejected various offers to settle, but agreed to withdraw and apologise for his allegation of malice on the grounds that he receive an apology for the allegation of admitted negligence and that each party bear their own costs.

No request was made of F to withdraw or apologise for the allegation that negligence had actually taken place. Consequently, F made an offer acknowledging that W was prepared to drop his demand for an apology for the negligence allegation, and highlighted the Court's determination that that there was no sting in the allegation of admitted negligence. The offer also requested that W withdraw his complaint of malice and that F would accept their costs to date.

Following further disclosure several months later, W purported by letter to accept F's offer, although the plea of malice was still being held out as a threat. He subsequently applied that he should be permitted to accept the offer.

HELD: (1) No outstanding offer by F to settle the proceedings remained by the time W purported to accept the offer that had previously been made.

W's offer had been clear that they were prepared to accept costs "to date", and that if the offer was not accepted the demands on W would be correspondingly greater as costs built up towards trial. It was therefore untenable to construe that that offer was to continue indefinitely into the future, such that W could accept it at any time. In any event, W's purported acceptance was not couched in the same terms as F's offer. (2) As a result, in light of W's conduct in the proceedings, F were entitled to their costs on the indemnity basis following the anticipated discontinuance of the proceedings. F had given W a full explanation as to why his claim for malice was likely to fail, and the arguments advanced had been particularly compelling and should not have been ignored. It was also unreasonable that W had rejected the offer for settlement on the ground that he was holding out for an apology over the admission issue, especially in light of the Court's finding that the allegation regarding negligence was the more significant of the two.

Further, W had continued to threaten malice, even after he had offered to apologise for the allegation, and unreasonable reliance on a plea of malice was clearly a relevant factor in determining the basis for costs, [McKenna v MGN Ltd Unreported July 16, 2007 QBD](#) considered.

Finally, there was evidence that W had tried to blame his inconsistent deed of variation on conflicting instructions given to him by his innocent client, and his conduct in relation to the negligence in question was also relevant.

Accordingly, it was completely unreasonable for W to launch and persist in the instant proceedings and to claim vindication that was clearly unwarranted. Application refused

## **10. CAROLINE HELVADJIAN AND AMBROSE APPLEBE SOLICITORS**

[2009] EWHC 90133 (COSTS) SCCO

## **CHIEF MASTER HURST, SENIOR COSTS JUDGE 30.01.09**

The failure of Solicitors to carry out the Client's instructions resulted in nothing being payable by the Client in respect of the Solicitor's profit costs.

An Order had been made for Detailed Assessment of twelve Bills delivered by the Defendant to the Claimant in respect of legal services rendered.

The Detailed Assessment was originally heard by Master O'Hare; his decision was the subject of an Appeal heard by Mr Justice Evans-Lombe who set aside the Master's Order but imposed a cap on the amount recoverable by the Solicitors, namely that in no circumstances *"Shall the amount payable by the Respondent to the Applicant exceed £30,000.00 in light of the price indication of 21 April 2006 given by the Applicant to the respondent but that this cap shall not apply to any costs found in the course of such Detailed Assessment not to have been contemplated by the Applicant in giving the said price indication"*.

The matter was referred to the Senior Costs Judge to deal with the Detailed Assessment of the Solicitor's Bills. An initial Hearing took place in October 2008 when the Senior Costs Judge gave a finding as to the extent of the Solicitor's Retainer, and the estimate which the Solicitors had given in respect of it, namely an Appeal brought by the Claimant's former Husband against the Order of District Judge Green (the Green Order) and her Cross-Appeal against the same Order, together with the potential Appeal against the Order of His Honour Judge Compston of 24 March 2006 (the Compston Order). The matter was adjourned part heard to 19 November 2008 and it became apparent that there was a conflict as to the exact instructions provided by the Claimant to her then Solicitors and further Directions were given including provision for the Solicitor to provide a typed version of the Fee-Earner's handwritten attendance note of a conference which took place with Counsel on 19 May 2006.

In accordance with a further direction the Claimant, acting as a Litigant in Person, provided a Witness Statement setting out her position with regard to her proposed Appeal against the Compston Order.

Two conflicts had arisen as to the extent of the Retainer, i.e. as to what the Solicitors were requested to do on behalf of the Client. The first was the extent of the initial Retainer; did it relate both to the Appeal and Cross-Appeal against the Green Order as argued by the Solicitor? Or did it relate in addition to the Appeal against the Compston Order of 24 March 2006?

The second conflict, which arose only if the original Retainer covered the Appeal of the Compston Order, was whether or not the Claimant had instructed her Solicitors to proceed with that Appeal, or to do nothing about it.

The Claimant was, as acknowledged by the Senior Costs Judge, "unwavering" throughout the proceedings, stated that her instructions were to pursue the Appeal against the Compston Order.

The Senior Costs Judge was unable to accept the Defendant's Solicitor's submissions stating it was "difficult to see what more Ms Helvadjian could have done to confirm her

instructions that she wished the Appeal against the Compston Order to proceed". The Solicitor provided comprehensive advice that the Appeal had no merit whereas the Claimant maintained that the Solicitors had misunderstood what she was saying about the Compston Order, and that accordingly their advice in respect of it was bad advice. The issue before the Senior Costs Judge was not whether the advice given was good or bad, the question was what instructions did the Claimant provide to her Solicitors and did the Solicitors carry out those instructions?

A careful review of the documentation and issues was undertaken including detailed consideration of the advice given at a conference with Counsel.

The Senior Costs Judge, in paragraph 90 of the Judgment, stated:

*"In the light of the evidence both oral and documentary I find that what Ms Helvadjen agreed to do was to accept Counsel's advice in relation to the Cross-Appeal. There is no indication that any conclusion was reached relating to the Appeal against the Compston Order. I further find that Ms Helvadjen gave Ambrose Appleby clear and distinct instructions from which she never wavered, in spite of the contrary advice which she received, that she wished them to proceed with the preparation of her Skeleton Argument in respect of the Appeal against the Compston Order, so that her Appeal would not be struck out. I am forced to the conclusion that, having advised Ms Helvadjen in strong terms that her Appeal was bound to fail, Ambrose Appleby quite simply ignored her instructions."*

The Senior Costs Judge went on to consider the effect of failure to carry out the Client's instruction and having found that the Retainer was an entire contract to deal with the Appeals, including the Appeal against the Compston Order, the Costs Judge found that the Solicitors having failed to carry out the Client's instructions, were not in a position to require her to pay their costs and found, therefore, that nothing was payable in respect of the Solicitor's profit costs.

#### **11. NICOLA IBBERTSON AND PETER SAMPSON AND MFI AND HOWDENS JOINERY**

[2009] EWHCA 90132 (COSTS)

##### **SCCO (MASTER SIMONS) 30.01.09**

**Failure to disclose the true nature of interest in recommending insurance rendered CFA unenforceable; employment of London Solicitors not recoverable when Claimant lived on the Isle of Wight.**

The Claimant suffered serious personal injuries whilst she was a passenger in a car that was being driven by the First Defendant. The claim was settled without issue of proceedings with the Claimant accepting the Defendant's Insurer's offer of £100,000.00 inclusive of interest and benefits together with costs to be assessed if not agreed.

The Claimant was represented by Pattinson & Brewer who acted for the Claimant pursuant to a CFA.

The Defendant challenged the enforceability of the CFA.

The CFA included an advice that a contract of insurance with **Freeclaim IDC** was appropriate. The CFA included:

(iii) *We confirm that we do not have an interest in recommending this particular Insurance Agreement.*

The Costs Judge was requested to consider whether the Claimant's Solicitors had acted in sufficient compliance with Regulation 4 of the Conditional Fee Agreement Regulations 2000 to enable the CFA to be enforceable between Solicitor and Client and therefore as between the paying and receiving parties.

A very short Statement was provided on behalf of the Claimant which included an admission that an error had been made by not removing the offending word "not" from the sentence "*We confirm that we do not have an interest in recommending this particular Insurance Agreement*". The Statement confirmed that the correct position had been made known to the Claimant's Stepfather to whom the Claimant had asked the Solicitor to speak on her behalf "*so both he and my Client were both well aware of our interest*".

The Defendant referred to the recent Accident Line Protect Cases now cited as **Tankard v John Fredericks Plastics Limited** in particular the obiter dicta of the Court of Appeal under the heading "Disclosure of Interest" and to the guidance set out in the Judgment.

The submission on behalf of the Claimant was that the Regulations were there for consumer protection and there was never any suggestion that the Claimant was not fully protected. Further the Claimant submitted that any breach of the Regulations had no material effect on the protection afforded to the Claimant.

Referring to **Tankard** the Costs Judge considered the Judgment "makes clear that the Solicitor must disclose to the Client the true nature of his interests in recommending the insurance so that the Client can make the necessary informed decision".

The Costs Judge expressed some surprise that the Witness Statement provided on behalf of the Claimant did not set out in detail "the nature of the relationship between her firm and Freeclaim IDC". The Statement simply explained that the CFA would always be checked and "there was simply an error in not removing the offending word "not". Having considered the correspondence sent to the Client, the Costs Judge found the Statement "difficult to reconcile".

The submission on behalf of the Claimant at the breach of the Regulations had no material effect and the protection afforded to the Claimant was rejected, again **Tankard** considered.

The Costs Judge accepted the Defendant's submission on the authority of **Tankard** that where there is a conflict between the wording of the CFA and what the Client had previously been informed, the wording in the CFA must prevail. The CFA dated 21 January 2005 was found to be unenforceable.

There was one other matter that the Costs Judge was requested to make a ruling in respect of, namely whether it was reasonable for the Claimant to have instructed Pattinson & Brewer who were based in the West End of London and who charged London rates in circumstances where the Claimant lived on the Isle of Wight.

The Defendant submitted it was unreasonable to have instructed London Solicitors there being many Solicitors in an area such as Southampton that could have dealt with the personal injury matter.

The Claimant relied on the fact that the injuries suffered by the Claimant were catastrophic; there was a major issue of contributory negligence which made the case complex. Thus in the circumstances it was reasonable for the Claimant to have instructed Solicitors.

The Costs Judge was unable to identify any evidence as to the reasonableness as to the reasonableness as to why a London Solicitor was instructed in this case, the only information the Costs Judge was able to glean from the limited information within the file was that it appeared that the Claimant had instructed Solicitors originally through BTE Insurers notwithstanding the fact that it transpired that the BT insurance cover was not in place.

The Costs Judge stated that all of the relevant authorities indicated that the relevant test is to ascertain as to whether or not the Claimant acted reasonably in not instructing Solicitors local to the Claimant's home.

The Costs Judge accepted the submission on behalf of the Defendant that notwithstanding the seriousness of the injuries there were many Solicitors in the Southampton area and in the south of England who deal with high value personal injury claims and, in the absence of any evidence to support the Claimant's submission that she acted reasonably in instructing London Solicitors, the Costs Judge found it was unreasonable for the Claimant to instruct London Solicitors and if, notwithstanding the decision regarding the unenforceability of the CFA, the assessment were to proceed, the hourly rates to be allowed would reflect those for Solicitors based in the Southampton area of England.

12.

**SALLY MOTTERSHEAD V ROYAL CORNWALL HOSPITALS NHS TRUST**

UNREPORTED

**TRURO COUNTY COURT (DISTRICT JUDGE MITCHELL)**

**DEFENDANT'S NOTE OF JUDGMENT following a 2 Day Assessment Hearing in Truro County Court that took place on 5 and 6 February 2009 before District Judge Mitchell**

**Mark Friston appeared on behalf of the Claimant: instructed by Harris Fowler; Jim Knight of Kain Knight appeared on behalf of the Defendant Trust: instructed by Bevan Brittan.**

The Claimant's Bill of Costs in this matter totalled £150,526.80 and was reduced on Assessment to £96,165.00 (with interest to be paid in addition).

As the Claimant failed to better the Defendant's offer of £100,000.00 (which was made in March 2008) the Trust was awarded £4,546.00 in respect of the Defendant's costs of the Assessment, this figure represented two thirds of the Defendant's costs as summarily assessed to take into account the fact that not all of the preliminary issues raised were successful.

Interest on the Claimant's costs for the period 28<sup>th</sup> April 2008 to 19<sup>th</sup> August 2008 was disallowed by reason of the Claimant's Solicitors' delay in serving the Bill.

Interest on the Claimant's costs, after allowing for £100,000.00 paid on account in December 2008, amounted to £5,318.06. After allowing for a set-off in respect of the Defendant's costs, the final amount due to the Claimant was £96,937.06. Deducting this figure from the £100,000.00 paid on account left a refund due to the NHSLA of £3,062.94.

The main issues arising on Assessment were dealt with as follows:

- Proportionality** – Mark Friston for the Claimant volunteered that the Claimant's Solicitors had valued the claim at £98,000.00 taking into account the significant risks faced and he argued that the total base costs of £63,000.00 were in no way disproportionate. Mr. Friston pointed out that their final figure had been significantly discounted to take account of the very real risk that they could lose the claim should the matter proceed to Trial. Mr Knight went through the relevant factors set out in CPR 44.5 and argued that in the Defendant's view, given the fact that the matter settled some 4 months before Trial, the base costs claimed were disproportionate particularly when compared with the Costs Estimate previously provided by the Claimant's Solicitors at the allocation stage. He also highlighted the Claimant's Solicitors' conduct and their refusal to take any reasonable steps to settle the dispute. Whilst the DJ accepted that clinical negligence cases generally are more complicated than other personal injury claims, in his view this particular case was not one of the utmost complexity. There were arguments regarding liability but, unusually, the Claimant relied solely upon the evidence of one medical expert. Accordingly the medical issues were not of any "significant complexity".

Mr Knight made the point that the Claimant's Solicitors were not specialists in the field of clinical negligence and the DJ took this point on board.

Mr Knight also pointed out that the time spent on documents (138 hours 30 mins) was a factor to be taken into account when considering the issue of proportionality and the DJ accepted that the time claimed was "unusually high". In his Judgment he found the solicitors net base costs of £63,000.00 to be "significantly high" for a case that did not get particularly near to Trial; he was required to make a value judgement and having regard to the complexity of the case, the importance of the matter to the Claimant, the level of costs involved, the value of the settlement and the estimated value

of the claim, he ruled that the base costs were indeed disproportionate. As a result the DJ proceeded with the Assessment applying the dual test of necessity and reasonableness.

- K Conduct Issues** – The DJ considered the Defendant’s specific arguments concerning the Claimant’s Solicitors’ conduct throughout when dealing with the proportionality issue. Mark Friston had argued that the Defendant could not go beyond the Consent Order however the DJ accepted that as a point of principle he could take account of conduct. This was not a case that came before the Court for Trial, no Trial Judge had considered the conduct arguments and therefore no-one had been required to take a view at judicial level until such time as the issue of conduct was raised on Assessment. Accordingly, it was open to the Defendant to raise the issue. However, the DJ went on to decide that the delays on the part of the Claimant’s Solicitors and their refusal to enter into any meaningful settlement discussions would not support a finding that the conduct issues raised should result in some abatement in respect of the Claimant’s costs overall.
- K Claimant’s Costs Estimate** – Again, the DJ considered the position with regard to the Claimant’s Costs Estimate which was lodged with the Allocation Questionnaire at the same time as he considered the proportionality issue. In the DJ’s view the position was not straightforward as at the Allocation stage the costs had been estimated to Trial and the matter then settled four months before the Trial took place. The DJ carefully considered the figures and took the view that the base costs subsequently claimed were not significantly or materially above the original estimate. He therefore decided that the estimate should not be taken into account for the purposes of the Assessment.
- K Method of Funding** – From the information contained in the Solicitors’ file the DJ satisfied himself that the Claimant’s Solicitors had carried out all necessary enquiries regarding the possible existence of alternative methods of funding available to the Claimant such as BTE Insurance. Mr Knight was shown the Solicitors’ “checklist” which confirmed this.
- K Conditional Fee Agreements** – The Claimant’s Solicitors had disclosed their CFA together with the CFA entered into by Counsel when serving their Replies towards the end of last year. However, they had not served the Risk Assessment that accompanied their CFA. Accordingly, there was a potential enforceability argument concerning any funding element allowed for in the Risk Assessment which Mr Knight raised. The original Risk Assessment was produced to the DJ who confirmed that the funding element had been assessed at zero although he did express surprise that the Risk Assessment had not previously been served upon the Defendant. Accordingly, the Solicitors’ CFA was enforceable.
- K Success Fees** – Both the Claimant’s Solicitors and their Counsel each sought to recover a Success Fee uplift of 100%. The Defendant argued in the Points of Dispute that the Success Fee for the Solicitors should not exceed 67% and that for Counsel it should not exceed 33%. This was based upon the Defendant’s assessment of the actual risks involved in this

case at the time that each CFA was entered into.

Mr Knight referred the DJ to a number of authorities which confirmed that the requirement to act reasonably meant that Solicitors were generally required to consider using a two stage Success Fee and which also supported the contention that it was premature to put an initial assessment at 100% based on the scant facts available at the outset of the case.

The authorities Mr Knight referred to included *Callery –v- Gray (2001)* which first recommended the use of two-stage Success Fees; *Atack –v- Lee (2004)* where the Success Fee was reduced from 100% to 50% in a case that went to Trial and settled for £30,000.00 on a finding of liability. He also referred to *KU –v- Liverpool City Council*, a case which found that a single stage Success Fee was unreasonable and where the 100% Success Fee claimed was again reduced to 50%. Mr Knight then referred the DJ to the cases of *Bensusan –v- Freedman* and *Lisa Barham –v- Dr. Athreya and Another* which confirmed these principles. However, the DJ concluded that none of the cases quoted precluded the allowance of a 100% Success Fee in a complex clinical negligence case and as a result he determined that 100% Success Fees for the Solicitors and Counsel were appropriate.

Mark Friston had relied upon the case of *Crane –v- Smith Docks* where the only risk involved related to quantum and where on appeal the Court considered that a Success Fee uplift of 87% was within the range available. Mr. Friston also relied on the fact that at the time Counsel entered into a CFA the Claimant was faced with conflicting medical evidence. Indeed a Professor McCloy had advised the Claimant that this was a case that she simply could not win. However, it also became apparent that Professor McCloy had proceeded on an incorrect basis and Mr Knight argued that the Defendant should not be penalised in costs by reason of the fact that this expert simply got it wrong.

The DJ accepted that he should not apply hindsight when considering the actual risks involved at the time each CFA was entered into; he accepted that a 100% Success Fee is more likely to be justified if it is applied in two stages with the risk being reassessed on completion of investigations or at the expiry of the Protocol Period and he also accepted that there was a minimal amount of information available to the Solicitors at the outset. Mark Friston also accepted that the Solicitors 50:50 assessment of the risks involved at the outset may well have been premature. Notwithstanding all of these facts the DJ concluded that a Success Fee uplift of 100% for the Solicitors and Counsel was “fully justified”.

- K After the Event Insurance** – This case involved a FirstAssist Pursuit Policy dated 26<sup>th</sup> October 2006 to which the NHSLA Accord clearly applied. The Pursuit Policy actually indicated that the premium rate was based upon “adverse costs plus own disbursements divided by normal fees of own Solicitor” which clearly did not reflect the Accord. However, the premium claimed in the Bill in the sum of £10,840.13 did appear to be based solely upon the Defendant’s actual costs and the Solicitors’ own disbursements.

As certain of the disbursements claimed were in dispute, (and would subsequently be disallowed), Mr Knight successfully argued that the Accord should be applied and it was agreed that the figure for actual liabilities (own disbursements) would be reviewed at the conclusion of the case.

Mark Friston attempted to argue that the premium was reasonable and proportionate having regard to the level of cover provided and should be allowed in full but this was not accepted by the DJ.

At the end of the Assessment the DJ allowed a premium of £9,550.00 inclusive of IPT based upon the Solicitors' own disbursements as allowed plus the Defendant's actual costs and he considered the final figure allowed to be more reasonable and proportionate. He also commented that the Accord between the NHSLA and First Assist represented a "sensible and pragmatic arrangement".

- Ⓚ **Hourly Rates** – The DJ accepted the Defendant's "local rate" argument as in his view there were a large number of "highly competent" Solicitors in Cornwall who could have dealt with this case. Whilst the Claimant was entitled to instruct any firm of her choosing she could not recover the increased costs resulting from the instruction of "distant" Solicitors based in Taunton. Accordingly, there was no "principal reason" to allow Taunton rates. In his view the Defendant's basic approach, as set out in the Defendant's Points of Dispute, was the right one and the hourly rates offered by the Defendant were accepted by the DJ as being reasonable (despite the arguments put forward by Mark Friston to the contrary).
- Ⓚ **Interest** – The delay argument was raised on behalf of the Defendant in the Points of Dispute as the Claimant's Bill was served some five months out of time. The Replies when finally served were also six weeks late. Accordingly, Mr Knight argued that interest should be disallowed for the full period of delay. However, the DJ considered it unrealistic to hold the Claimant to the initial three month period for serving the Bill given the fact that the parties were in "negotiations" concerning the original Costs Schedule with the Defendant's final offer being made on 17<sup>th</sup> March 2008. Accordingly, he was prepared to extend the three month period by a further six weeks which resulted in interest on the Claimant's costs being disallowed from 28<sup>th</sup> April 2008 to 19<sup>th</sup> August 2008.
- Ⓚ **Funding Costs** – In the Points of Dispute the Defendant argued that work relating to the Claimant's funding arrangements (CFA/ ATE) should not be allowed on the Standard Basis Inter-Partes. Mr Friston argued that these were reasonable costs reasonably incurred and he knew of no authority that would preclude the recovery of "funding" costs.

Mr Knight relied referred to the decision of Master Rogers in the case of *Woolley –v- Haden Building Services [2008] EWHC 90111 (Costs)* where the Learned Costs Judge confirmed that "*the costs of funding have never been recoverable and nothing has changed as a result of the introduction of CPR or, indeed, as a result of the introduction of the CFA Regulations and therefore that element of this bill in which the Claimant seeks to recover its*

*funding costs, fails.”*

Mark Friston pointed out that as this was a Master’s decision it was not binding. The DJ accepted that there were divergences of opinion amongst the Judiciary as to whether the cost of a party’s funding arrangements are recoverable. However, he had always taken the view that funding costs were not recoverable. The DJ equated such costs to correspondence with the LSC under a Certificate of Public Funding, and as a result the “funding” costs claimed in the Bill were disallowed.

- Ⓚ **PI Trusts** – Significant costs were claimed in the Bill for correspondence and advice given in relation to “PI Trusts” and much of this work post-dated the settlement and final Order. Mark Friston attempted to argue that it was reasonable for the Claimant’s Solicitors to advise the Claimant with regard to the possibility of investing her damages in a PI Trust (this included consulting an Independent Financial Planner). However, the DJ accepted the Defendant’s argument that such costs fell outside the litigation process, were not covered by the final Order for costs and did not fall to be paid on the Standard Basis Inter-partes.
- Ⓚ **Bill Preparation** – As the Claimant failed to beat the Defendant’s offer of £100,000.00 the significant costs associated with the preparation of the Bill that totalled £11,596.60 (inclusive of Success Fee and VAT) were disallowed.
- Ⓚ **Appeal** - At the end of the Assessment Hearing Mark Friston sought leave to appeal the DJ’s decision concerning proportionality and the disallowance of the various “funding” costs but both applications for leave to appeal were refused. To protect the Defendant’s position, Mr Knight then sought leave to appeal the DJ’s decision to allow Success Fees of 100% (on the basis that this decision flew in the face of the established authorities) but this application was also refused.

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