- The Defendant Costs Specialists

Costs Law Update – 25th May 2006

Woollard v Fowler – Medical Agency Fees

Judgment has just been handed down in an important case, *Woollard v Fowler* [2005] EWHC 90051 (Costs), concerning the recoverability of the charges made by medical agencies in costs covered by the predictable costs regime of CPR 45. This was a decision of the Senior Costs Judge, Master Hurst, sitting as a Recorder.

Medical reports and records had been obtained by the claimant's solicitors through a medical agency, Mobile Doctors Ltd, in a road traffic accident where the costs were covered by CPR 45. The costs claimed included fees paid to the medical agency which included both the amounts paid to the actual expert, GP surgery and hospital but also further charges for the work performed by the agency in obtaining these items. For example, the fee for the medical report was £435 of which only £275 went to the surgeon, with the balance going to the agency.

The defendant argued, successfully at first instance, that the fixed profit costs allowed for under Part 45 were to include all work of a fee earner nature. The rules did not contain any provision to enable an element of profit costs work to be subsumed within a disbursement and awarded in lieu of profit costs. Therefore the additional costs of medical agency were disallowed.

That decision was not followed by Master Hurst who concluded that the wording of the rules that specified that the recoverable disbursements included "the cost of obtaining - (i) medical records; (ii) a medical report" was not accidental and was because the rule drafter was well aware of the common practice of the use of medical agencies. The charges raised by medical agencies had previously always been treated as disbursements and CPR 45 did not alter the position. He therefore held that the medical agents' charges were recoverable.

Worryingly for defendants, he also held that "the test on all assessments is one of reasonableness and proportionality but there seems to be no reason why an agency should not be used to obtain an engineer's report if, in all the circumstances, it was reasonable and proportionate to do so". This seems to be an open invitation to solicitors to seek to delegate further items of work to agents. This will inevitably lead to more and more elaborate schemes where certain claimant solicitors will seek to do less and less work to obtain their fixed fees whilst simultaneously obtaining various kick-backs from the agents they instruct to perform the delegated work.

Correcting Defective CFAs

Brierley v Prescott – Retrospective CFAs

In *Brierley v Prescott* [2006] EWHC 90062 (Costs) Master Gordon-Saker was asked to rule on whether an attempt to correct a CFA that was allegedly defective had succeeded as a result of the solicitors and their client entering into a retrospective CFA after the conclusion of the case.

The Master held that this attempt failed as, following *Arkin v Borchard Lines Ltd* [2001] NLJR 970, an agreement made after the conclusion of the proceedings to vary a CFA relating to those proceedings would be unenforceable as contrary to public policy. Further, the Master doubted that a solicitor could comply with the CFA Regulations 2000 where the proceedings had already concluded and the costs had already been incurred.

Oyston v Royal Bank of Scotland – Deed of Variation

In *Oyston v Royal Bank of Scotland* [2006] EWHC 90053 (Costs), Master Hurst was asked to consider a CFA where the success fee was stated as being 100% plus £50,000 if the damages recovered exceeded £1 million. It was clear that the CFA was defective in that the success fee exceeded the maximum of 100% and would therefore be unenforceable. However, the claimant's solicitors had sought to correct this defect by entering into a Deed of Variation with their client to remove the reference to £50,000. Alternatively, they sought severance of the offending words. Again, these attempts to correct the defects in the original CFA failed.

The Master held that the Deed of Variation was ineffective to rectify the situation as against the paying party. By that date the issues between the parties had been resolved. Following the decision of the Privy Council in *Kellar v Williams* (Appeal No.13 of 2003) [2004] UKPC 30), he held that it cannot be right that a Deed of Variation can be used to impose a greater burden on the paying party than existed before judgment. However, he expressed no view as to what would have been the outcome if the Deed of Variation had been entered into before the conclusion of the case.

Further, the attempt to remedy the problem by severance also failed as it would be contrary to public policy.

As Master Hurst summarised, "If either the Deed of Variation or severance were to be permitted late in the day, this would have the effect of enabling virtually all defective CFAs to be put right late in the day, even if this was only after the paying party had pointed out the alleged defects."

Brennan v Associated Asphalt Ltd – Deed of Rectification

In *Brennan v Associated Asphalt Ltd* [2005] EWHC 90052 (Costs), another case heard by Master Hurst, the Court was faced with a CFA which stated that the claimant could not recover from the opponent that part of the success fee which related to postponement of charges and disbursements ("as set out in paragraph (a) and (b) at Schedule 1"). Schedule 1 of the CFA stated that the success fee was 50% and reflected a number of factors including (a) and (b) which related to the postponement elements. However, the agreement did not then specify how much of the success fee was actually attributable to the postponement elements and the defendant therefore argued that this was a breach of Regulation 3(1)(b) of the CFA Regulations 2000.

The Master held that this was indeed a breach of the Regulations. However, he then went on to find that this was not a material breach as, following the Court of Appeal's decision in *Titchband v Hurdman* [2003] EWCA Civ 718, "the failure to specify a postponement element means that nothing in respect of this would ever be recoverable from the client".

However, during the course of the detailed assessment proceedings, once the defendant had raised their concerns in relation to the validity of the CFA, the solicitors and their client entered into a Deed of Rectification. At the hearing before Master Hurst, the claimant did not seek to rely on this document other than as confirmation as to the state of mind of the parties at the time the CFA was entered into. Nevertheless, again on the basis of *Kellar v Williams*, Master Hurst did express considerable misgiving as to whether a subsequent arrangement made between the solicitor and client, which produced a larger costs bill than the original agreement, would have been effective against the defendant to correct a materially defective CFA. A larger bill would be the inevitable consequence if the original agreement was defective.

The above cases of *Brierley*, *Oyston* and *Brennan* give a very clear indication that attempts to correct defective CFAs, at least when made after the conclusion of the case, are likely to fail regardless of whatever ingenious schemes claimant solicitors may come up with.

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