

Legal Costs

NEGOTIATORS LTD

Newsletter

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10 Year Anniversary

For LCN, September 2005 marked an important milestone in the company's history. In addition to seeing average savings achieved on third party costs claims break through the 35% barrier, it marks LCN's 10th anniversary – ten years of delivering customer focused excellence in costs law.

LCN has come a long way in those ten years. From a two-man operation, LCN has grown into a national company, with offices in London and Manchester, operating at the forefront of costs law. During the last decade LCN has been responsible for a number of firsts, including being the first defendant costs negotiators in the UK and being the first to challenge the legality of Claims Direct referral fees, ultimately leading to the test cases. We have also been involved in a number of other important test cases throughout this period.

Paul Turner, founder, said "Whilst working as a Cost Draftsman in the early 1990's, it became clear that bills being passed to many insurers were paid without question, even when there

was significant doubt as to the reasonableness of the costs presented. This led to a small minority of solicitors' firms exaggerating the level of costs incurred and an ever increasing difference between third party costs payable on claims and solicitor own client fees. We wanted to help insurers control the burden of ever increasing third party legal costs."

Throughout the last ten years costs law has undoubtedly been the most fiercely contested and fastest changing area of law in the UK. The introduction of the Civil Procedure Rules in 1998 and the new regime of Conditional Fee Agreements have led to costs becoming more technical and complex. Paying parties must now be fully conversant with these new developments to enable them to fully ensure that they are only paying proper and reasonable costs. LCN has recognised this shift in emphasis from simply negotiating a reduction in costs to the current requirement of being able to supply the highest level of technical expertise on costs claims.

As a direct consequence of these developments, the range of services we offer has widened over the years. Initially LCN offered costs negotiation services to insurers; today LCN provides a wide range of costs related services to the Defendant market, including advocacy, drafting Points of Dispute and Bills of Costs, negotiation, training, consultancy and advice.

To commemorate this anniversary LCN will be running a number of events throughout the next year, including the LCN 10th Anniversary Golf Challenge Cup which will be held at various Marriott courses commencing Easter 2006 and culminating in a grand final to be held at one of Europe's most spectacular courses in September 2006. We hope that the competition will provide not only an enjoyable series of matches, but also an opportunity to meet others working in your chosen field. Further details will be sent nearer the time, but if you would like to register your interest in this event please email david.rodwell@lcnltd.co.uk ■

LCN's Advocacy Service

LCN have a long-standing reputation for the services we provide to insurance companies. However, in recent years we have developed a strong reputation for the advocacy service we offer direct to panel solicitors.

Our specialist team of 7 in-house advocates – all qualified

barristers – are able to meet your advocacy needs at detailed assessment at any court in the country. Our extensive experience of high value claims, industrial disease and CFA issues, in addition to more routine claims, enables us to provide an extremely professional service when it is most needed.

To find out more, please contact Harriet Stone (London) on 0870 766 4128 or email harriet.stone@lcnltd.co.uk or Paul Jones (Manchester) on 0870 766 4469 or email paul.jones@lcnltd.co.uk. ■

LCN Slash Success Fee

In our last Newsletter we reported on the case of **Haines v Sarnier**, heard in the SCCO, where judgment was being awaited on an important technical issue concerning CFAs entered into after liability has been admitted. The CFA used was the Law Society's Model Agreement.

The wording of this agreement allowed the solicitor to charge their fees if a "win" was achieved. A "win" was defined as a court decision or agreement to pay damages. There was a Part 36 clause which stated that if a Part 36 offer was made by the defen-

dant and was rejected, on the advice of the solicitors, and was not subsequently beaten, the solicitors would not add their success fee to their basic charges. Simon Gibbs, representing the defendant, argued that as a "win" had already been achieved at the date the CFA was entered into the success fee should be disallowed entirely, or only allowed at a very nominal amount. Even if the defendant made a successful Part 36 offer, the solicitors were still entitled to all their normal charges. The reality was that the case was risk free to the solicitors,

even if not to the claimant.

The Court agreed with his submissions and reduced the success fee from 60% to 5%. This case highlights the importance of undertaking a careful analysis of the definition of "win" within the CFA and the stage at which proceedings had reached. A full copy of the judgment can be found on the SCCO website (<http://www.hmccourts-service.gov.uk/infoabout/scco/transcripts/index.htm>). Alternatively, contact Simon Gibbs, details below, to discuss this case in more detail. ■

Costs Estimates: The 20% Rule

From the 1st October 2005, the Costs Practice Direction has been amended in relation to how the court will deal with costs estimates. Where a party is seeking to recover costs, if they have previously filed a costs estimate, as they should have done at the allocation and listing stage, and the final costs being claimed exceed this estimate by 20% or more, then that party has to file a written statement as to why the estimate has been exceeded. If they

fail to do so, or the court is not satisfied by the reasons, then the court may take this as prima facie evidence that the costs being claimed are unreasonable or disproportionate.

It will therefore become increasingly important to make costs estimate accurate and for a paying party to raise the issue where the estimate proves to be unreliable. By setting a relatively low margin for error of 20%, the courts have shown that they intend to rely on

estimates to a greater degree in the future when assessing the reasonableness of costs.

Also in the area of costs estimates is the recent judgement of the Court of Appeal case of **Garbutt v Edwards**. This case considered the issue of the effects of a failure to serve costs estimates on a solicitor's own client. This case was covered in a recent LCN Technical Update. ■

Predictable Costs and Medical Agents' Fees

Following the implementation of predictable costs for RTA cases, the one question that has been asked most commonly is whether a solicitor can recover the costs of obtaining a medical report via an agency. The rules specify that the solicitor can recover the 'the cost of obtaining a medical report', CPR 45.10(2), but it is argued for paying parties that the fees of an agent are considered part of a

solicitor's profit costs and therefore should be included within the fixed predictable costs and not recovered separately.

This was the issue to be decided in the case of **Earle v Centrica PLC** (2005) and it was held by DJ Bazley White that the solicitor could not recover the agency fees as they were indeed to be considered part of profit costs and were therefore covered by the pre-

dictable costs. The fees for the medical report and the medical records were limited to the amounts actually paid to the doctor and the supplier of the records.

Whilst this decision is only a County Court decision, it does provide a persuasive example of the argument that agency fees on medical reports should not be allowed in predictable costs cases. ■

Overcharging

The imaginative nature of solicitors' billing knows no limits. The following entries, which were being charged for, appeared in a recent bill audited by LCN:

"clearing the meeting room"

"liaising with IT regarding the state of play as to setting a computer up with Microsoft Outlook"

"making enquiries as to obtaining larger PC Screens"

. . CASE REPORTS . . CASE REPORTS . . CASE REPORTS . .

Court of Appeal Rules on Success Fees in Tripping Case

In the first published higher court decision in relation to success fees in public liability claims, the Court of Appeal has ruled that a success fee of no more than 50% should be allowed.

The facts in **KU v Liverpool City Council** [2005] EWCA Civ 475 were that a four year old child stepped into a concealed hole on a grass verge and cut her leg. A claim was made against the local authority, funded by a Conditional Fee Agreement (CFA), and the solicitor

assessed the chances of success as no better than 50/50 and therefore set the success fee at 100%. The risk assessment supporting the success fee cited issues surrounding the identity of the Defendant and the possibility that the statutory defence would be raised and at the hearing further evidence was produced showing the success rates of claims such as this. The Court of Appeal was not convinced and held that a success fee of 50% was appropriate, representing a two to one chance of success in the claim.

The importance of this judgment does not, however, rest with the level of success fee allowed. The other main argument was whether the court could, or indeed should, allow different levels of success fee for different stages of the case rather than allowing the success fee set at the outset of the case to continue until the case concludes. The Costs Practice Direction at s11.8(2) explicitly confirms that the court has the power to allow different success fees for different periods and in **Cheshire County Council v Lee** (unreported

9/5/03 – Chester CC) the court had allowed a reduced success fee from the time that liability was admitted and a success fee of only 5% from the date of settlement to the conclusion of the detailed assessment of costs. The DJ at first instance in **KU** had made a similar decision.

The Court of Appeal considered this issue and ruled that the court did not in fact have this power. The Practice Direction was simply wrong and the decision in **Lee** was also wrong. The Court therefore confirmed that whatever the court considered to be a reasonable success fee at the time it was assessed would

apply to the whole of the case and would not be reduced (or increased) for different periods of the case. The only exception was where the CFA actually allowed for the success fee to change in specified circumstances but in the absence of such a term, the court could not impose a change.

What the court did say was that judges should be more willing to approve high success fees in cases where the CFA contained a provision that a lower success fee would be payable if the case settles at an earlier stage. By contrast, where there was no such provision, as in this case, it would be much more difficult for a

solicitor to convince a court that a success fee approaching 100% should be allowed.

KU is therefore a key judgment in relation to success fees in public liability claims and more generally to success fees in all cases. Arguments that success fees should be reduced following an admission of liability will now be doomed to fail but it will be interesting to see whether this judgment will encourage solicitors to utilise the two-stage success fee that the Court of Appeal seems so keen to advocate. ■

After the Event insurance – Test Case

On the 27th May 2005, the judgment of the Senior Costs Judge was delivered in the **RSA Pursuit Test Cases** (2005) SCCO. The 486 paragraphs of the judgment set out a close analysis of the details of an After the Event (ATE) insurance product and whether the sums being claimed for the premium were payable by a losing party to litigation and if so, how much was reasonable. Whilst the judgment is strictly only applicable to this particular insurance product, there are some important issues of more general application that come out of the judgment. When considered together with the **Accident Group** and **Claims Direct Test Cases**, the courts general approach to ATE premiums can be summarised.

Was it reasonable to take out that particular premium?

A party must show that it was reasonable to choose the particular ATE policy they have paid for. If the paying party can demonstrate to

the court that cheaper policies were available, the burden would then fall on the receiving party to justify why the more expensive policy was take out. If they cannot do this, then the cost of the ATE premium will not be fully recovered.

Is the cost of the premium reasonable and recoverable?

The court will consider the manner in which the premium is calculated and what elements it contains. If it contains elements that are not properly considered to be costs of an insurance premium they will be disallowed. Further, if the method by which the premium is calculated is flawed, then the court may recalculate the premium having corrected the flaw (as in the **RSA** cases).

Is it reasonable and proportionate for the paying party to pay the premium?

Even if the premium was reasonably chosen, there are no elements that should not properly be includ-

ed and the method of calculating the premium is appropriate, this does not necessarily mean that the full amount of the premium will be payable. A paying party is only required to pay reasonable and proportionate costs and therefore the court must still consider the final amount being claimed for the premium and decide whether it is reasonable and proportionate for the paying party to pay it. The fact that the premium is a reasonable one from the perspective of the receiving party, for example where it was the only one available or the cost compares favourably with comparable market rates, does not necessarily mean that this should be paid as part of inter partes costs.

It is clear that the amount payable for ATE premiums as part of inter partes costs is far from simple and disputes can be expected for the foreseeable future. ■

Yet Another New CFA Regime

On the 10th August 2005 the Department for Constitutional Affairs announced the optimistically titled New Regulations for Conditional Fee Agreements (CFAs) with the intention:

“to make CFAs simpler, clearer and more transparent both for the individuals using them and the solicitors advising individuals about their cases and whether to use CFAs”

The principal method by which the CFA regime will be simplified is by revoking the statutory instruments that currently set out the requirements for a valid CFA or CCFA from the 1st November 2005. All that will remain of the statutory framework is the requirement that CFAs are in writing and the maximum success fee is still 100%.

The regulations will be replaced by amendments to the Law Society Solicitors Practice Rules thereby effectively reappearing under the guise of solicitors' practice rules. It will therefore be a matter of professional conduct, regulated by the Law Society, as to whether the appropriate steps have been taken by a solicitor when entering into a CFA. At the same time, the Law Society has also published a new model CFA that reflects the new system of regulation and is intended to be a much simpler document, easier for a client to understand

and accurately reflecting the new regulatory position.

The new rules, whilst covering much of the same ground as the previous regulations, are phrased in a less prescriptive way and are, as one would expect, set out in broader terms than the regulations. The intention is that solicitors will be expected to comply less with the letter of the rules, but rather with the spirit, meaning that clients will be fully informed in relation to costs and CFAs in particular.

So what does this all mean? The theory is that technical challenges to CFAs will be a thing of the past. However, the regulations still apply to all CFAs taken out before November 2005 and there is the vexed question of whether paying parties will be able to argue that a breach of the new rules will still render a CFA unenforceable. Will the arguments merely change focus rather than disappear altogether?

This was recognised by the Explanatory Memorandum to the Conditional Fee Agreements (Revocation) Regulations 2005 prepared by the Department for Constitutional Affairs. This states:

“The Law Society regulates solicitors through the professional practice rules and costs information code and would therefore oversee conduct and compliance. Failure to comply with the rules may result in solicitors being

“the courts may find that a CFA is unenforceable and solicitors will lose their costs”

subject to disciplinary action. If a CFA is not materially compliant with the Law Society's rules and model agreements the courts may find that a CFA is unenforceable and solicitors will lose their costs.”

What is clear is that, for the foreseeable future, the focus on CFAs will continue and it remains imperative to ensure that any costs payable under a CFA are valid, reasonable and recoverable. ■

New CFA Regime Seminars

In light of this fundamental change in the way CFAs are regulated, LCN will be holding a number of seminars dealing with the new system and its practical effects.

Please e-mail paul.jones@lcnltd.co.uk for further information.

Meet the Staff



Simon Gibbs

Simon was educated at Christ's Hospital and the University of Liverpool before qualifying as a Barrister in 1995 at the Inns of Court School of Law. He worked in the Litigation and Planning Department of Westminster City Council before joining LCN in 1997. Simon regularly has articles printed in the legal and insurance press and is a frequent speaker on costs at industry and training conferences. He represented the defendants in the high profile SCCO cases of **Pirie v Ayling** and **Haines v Sarnar** and was heavily involved in the initial challenges to the Claims Direct and Accident Group schemes. Simon is Technical Manager in LCN's London office with responsibility for the specialist costs advocacy team. ■



David Rodwell

David qualified as a Chartered Accountant in 1995 and joined LCN in 1997 from Deloitte & Touche. During his time in practice David specialised in the provision of services to Solicitors and in particular the Solicitors' Accounts Rules. In 2000 he became General Manager of the Manchester office and in June 2005 was appointed to the Board. Since joining LCN David has become an expert in the areas of VAT affecting both solicitors and insurers (including Delegated Authorities and VAT on claims). David is a keen golfer and a member of the Faculty of Finance and Management. ■

Deutschland Uber Alles

Concerns about excessive legal fees are not new. However, English lawyers have some way to go to match one of their German counterparts.

Dr Jurgen Grafe acted for an elderly pensioner from St Augustin, near Bonn, who was sent a tax demand for €287 million. The client's income was

actually only €17,000. The lawyer wrote one routine letter to the authorities to get the demand corrected. German law allows lawyers to calculate their fees based on the amount of the reduction achieved. A court confirmed that his fee of €440,234 (£308,000), for writing one letter, was correct.

This Newsletter, and previous issues, can be downloaded from our website

www.lcnltd.co.uk

Please feel free to circulate these to your colleagues.

Contacts

To discuss any of the items within this newsletter in more detail please contact:

Simon Gibbs,
Negotiations Manager
London Office: 0845 166 8648

If you are interested in finding out how LCN may be able to help you please contact:

John Webb
Director, London Office
Tel: 0845 166 8647
Email: john.webb@lcnltd.co.uk

or

Paul Jones
Technical Director
Manchester Office
Tel: 0870 766 4469
Email: paul.jones@lcnltd.co.uk

Manchester Office

Armstrong House
1 Houston Park
Salford Quays
Manchester M50 2RP
DX: 20339 Salford Broadway

London Office

56 Marsh Wall
Isle of Dogs
London E14 9TP
DX: 42673 Isle of Dogs